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NO._____

SUPREME COURT OF THE

UNITED STATES

MAXINE L. MASTROPIETRO, PETITIONER

V.

ROBERT ALAN MASTROPIETRO, RESPONDENT

ON WRIT OF CERTIORARI TO THE

SUPERIOR COURT OF NEW JERSEY,

APPELLATE DIVISION

PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

NO._____

October Term, 1986

MAXINE L. MASTROPIETRO,
Petitioner,
v.
ROBERT A. MASTROPIETRO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

The petitioner, Maxine L. Mastropietro, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division, entered in this proceeding on April 30, 1986. A petition for certification to the Supreme Court of New Jersey was denied, without opinion, on June 27, 1986.

QUESTIONS PRESENTED

1. Whether petitioner was deprived of Due Process and Equal Protection of the law under the 14th Ammendment to the U.S. Constitution, by the decision of the trial court, affirmed by the Superior Court of New Jersey, Appellate Division, to amend a 5 year old divorce judgment, without affording petitioner the procedural safeguards, and without applying proper standards, required by state law.

2. Whether petitioner was deprived of parenting rights in violation of the 1st, 9th and 14th Ammendments to the U.S. Constitution, by the decision of the state courts to summarily amend a 5 year old divorce judgment which set forth a parental choice as to where the children of the parties should live, in the absence of any evidence that that parental choice was harmful to the

welfare of the children.

3. Whether petitioner was deprived of Due Process and Equal Protection by being ordered to relinquish valuable property rights without benefit of an evidentiary hearing, required by New Jersey state law.

TABLE OF CONTENTS

PAGE

Questions Presented.....2

Table of Contents.....1

Appendix.....13

Table of Authorites.....14

Jurisdiction.....16

Statutes, Rules and Constitutional Provisions Involved.....17
Statement of tne Case.....4

Reasons For Granting Writ.....15

1. AT EVERY LEVEL OF THIS PROCEEDING, PROCEDURAL SAFEGUARDS AND SUBSTANTIVE STANDARDS REQUIRED BY NEW JERSEY LAW WERE VIOLATED. THE RESULT WAS THAT PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION GUARANTEED BY THE 14TH AMENDMENT.....15

2. THE DECISION OF THE TRIAL COURT, AFFIRMED BY THE APPELLATE DIVISION, TO OVERRIDE A 1980 PARENTAL CHOICE AS TO WHERE THE CHILDREN OF THE PARTIES SHOULD LIVE. IN THE ABSENCE OF ANY EVIDENCE THAT THAT PARENTAL CHOICE WAS HARMFUL TO THE CHILDREN, DEPRIVED PETITIONER OF HER PARENTING RIGHTS IN VIOLATION OF THE 1ST, 9TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION.....50

3. THE TRIAL COURTS ORDER REQUIRING

PETITIONER TO RELINQUISH HER REVERSIONARY INTEREST IN THE MARITAL PROPERTY WITHOUT BENEFIT OF AN EVIDENTIARY HEARING, OTHERWISE REQUIRED BY NEW JERSEY LAW, VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE 14TH AMENDMENT.....53

APPENDIX

PAGES

1980 DivorceJudgment.....a1 -a10

1981 PropertyDeed.....a10-a17

Certif of Defedant.....a17-a23

July 5 Certif Opos.....a23-a30

July 12 Transcrit.....a30-a40

July 15 Order.....a40-a43

July 25 Cert OpposRecon.....a43-a50

August 2 Transcript.....a50-a55

August 9 Order.....a55-a58

Judge Letter Sept 6.....a58-a59

Judge Letter Sept 17.....a59-a60

Cert Clarify Form Order.....a61-a63

Appellate Brief.....a63-a90

App Reply Brief Pet.....a91-a93

Appellate Div Opinion.....a94-a102

Pet NJ Supreme Court.....a102-a105

NJ Supreme Ct Denial.....a105-a106

TABLE OF AUTHORITIES

pages

Ackerman v United States
340 US 193 (1950).....40
Arnett v Kennedy
416 US 134 (1974).....44
Barrie v Barrie
154 Super 301 (App Div 1977)..49
Bauman v Marinaro
95 NJ 380, 385 (1984).....25
Brown v Mississippi
297 US 278 (1936).....16
Carey v Piphus
435 US 262 (1978).....16
Chambers v Florida
309 US 227 (1940).....16
Chicago Life Ins v Cherry
244 US 25 (1917).....37
Cleveland Bd of Ed v Loudermill
105 S Ct 1482 (1985).....44
Court Invest Co v Perillo
48 NJ 334 (1966).....25
Doyle v Chase Mannatten Bank
80 NJ 105 (App Div 1963).....25
Edgerton v Edgerton
203 NJ Super 160(AppDiv1985)..33
Fusco v Fusco
186 Super 321 (ChDiv 1982)....44
Ganther v Ganther
153 NJSuper 226 (AppDiv1977)..32
Gibbons v Gibbons
86 NJ 515 (1981).....33
Goldberg v Kelly
397 US 254 (1970).....44
Gulick v Gulick
113 NJSuper 366 (ChDiv1971)...33
Hodgson v Applegate
31 NJ 29 (1959).....34
LaBell v Quasdorf

116 NJL 368, 372(SupCt1936)...36
Lassiter v Bd of Soc Services
452 US 18 (1981).....51
Manning Engineering v
Hudson Cty Park Comm
24 NJ 113 91977).....34
Marshall v Jerricho, Inc
446 US 238 (1980).....16
Michigan-Wisconsin Pipeline
v Calvert
347 US 157 (1954).....9
Minder v Georgia
183 US 559 (1901).....56
Oldfield v Stoeco Homes Inc
26 NJ 246 (1958).....54
Palko v Palko
73 NJ 395 (1977).....35
Quagliato v Bodner
115 NJSuper 133 (AppDiv1971)..25
Rideau v Louisiana
373 US 723 (1963).....16
Roberts v City of New York
295 US 264 (1934).....37
Schware v Bd of Bar Examiners
353 US 232, 239 (1957).....38
Snyder v Massachusetts
291 US 97 (1934).....16
Stanley v Illinois
405 US 645 (1972).....51
Western Union Telegraph Co v
Priester
276 US 252 (1928).....9
Yick Wo v Hopkins
118 US 355 (1886).....39

JURISDICTION

The decision of the trial court was affirmed by the Superior Court of NJ, Appellate Division on April 30, 1986 (a102). A petition for certification was denied by the Supreme Court of New Jersey on June 27, 1986 (a106). This petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

1. United States Constitution, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

2. United States Constitution, Amendment 9:

> The enumeratioon in the Constitution

of certain rights, shall not be construed to deny or disparage others retained by the people.

3. United States Constitution, Amendment 14: section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priveleges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Rules Governing the Courts of the State of New Jersey, 1986, Rule 4:50-1,2:

RULE 4:50. RELIEF FROM JUDGMENT OR ORDER

4:50-1. Grounds of Motion

On motion, with briefs, and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment or order for the following reasons: (a)mistake, inadvertence, surprise, or excusable neglect; (b) newly discovered evidence which would probably alter the judgment or order and which by due diligence could not have been discovered in time to move for a new trial under R.4:49;(c)fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (d) the judgment or order is void; (e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is not longer equitable that the judgment or order

should have prospective application; or (f) any other reason justifying relief from the operation of the judgment or order.

4:50-2. Time of Motion

The motion shall be made within a reasonable time, and for reasons (a), (b) and (c) of R.4:50-1 not more than one year after the judgment, order or proceeding was entered or taken.

5. Rules Governing the Courts of the State of New Jersey, 1986, Rule 4:42-1 Form; Settlement:

(a)Form; Settlement by Motion or Consent. A judgment shall not contain a recital of the pleadings or a record of prior proceedings. Except as otherwise provided by paragraph (b) of this rule, by other rule or by law, and except for ex parte matters, no judgment or order shall be signed by the court unless the form thereof has been settled on motion

on notice to all parties affected thereby who are not in default or failure to appear, or unless the written approval of such attorneys or parties to the form thereof is endorsed thereon. Formal written judgments or orders shall be presented to the court for execution within 10 days after its decision is made known, unless such time is enlarged for good cause.

(b) Settlement on Notice. In lieu of settlement by motion or consent, the party proposing the form of judgment or order may forward the original thereof to the judge who heard the matter and shall serve a copy thereof on every other party not in default together with a notice advising him that unless he notifies the judge and the proponent of the judgment or order in writing of his specific objections thereto within 5 days after such service, the judgment or order may

be signed in the judges discretion, if no such objection is timely made, the judge may forthwith sign the judgment or order. If objection is made, the matter may be listed for hearing in the discretion of the court.

(c) Submission and Filing of Orders and Judgments. An original and two copies of all forms of orders and judgments shall be submitted to the judge together with a self-addressed, stamped envelope. The judge signing the order or judgment shall file the original and one copy thereof and return one copy to the attorney submitting the order or judgment. In matrimonial matters such additional copies of the orders shall be submitted as required by the court.

6. Rules Governing the Courts of the State of New Jersey, Rule 1:6-3: Time for Serving and Filing Motions, Cross-motions and Affidavits:

Except as otherwise provided by R.4:46-1(motion for summary judgment), a notice of motion, other than an ex parte motion, shall be served and filed not later than 14 days before the time specified for the return date unless otherwise provided by rule or court order. For cause shown, such an order may be made on ex parte application. If a motion is supported by affidavit, the affidavit shall be served and filed with the motion; and, except as provided by R.4:49-1(b)(motion for new trial), any opposing affidavits and corss-motions or objections filed pursuant to R.1:6-2 shall be served and filed not later than 8 days before the return date unless the court permits them to be served at a later time. Answers or responses to any opposing affidavits and cross-motions shall be served and filed not later than 4 days before the return date unless the

court otherwise orders.

5. N.J.S.A. 2A:62-1, 4, 17, 18: ACTIONS TO QUIET TITLE:

2A:62-1. By person in peaceable possession

Any person in the peaceable possession of lands in this state and claiming ownership thereof, may, when his title thereto, or any part thereof, is denied or disputed, or any other person claims or is claimed to own the same, or any part thereof or interest therein, or to hold a lien or encumbrance thereon, and when no action is pending to enforce or test the validity of such title, claim or encumbrance, maintain an action in the superior court to settle the title to such lands and clear up all doubts and disputes concerning the same.

2A:62-4. Jury trial; issues; place of trial

Upon the application of either party, a jury trial shall be directed to try the validity of a claim made to the affected lands, or to settle the facts, or any specified portion of the facts upon which the same depends. The trial may be held in and before a jury of a county other than that in which the lands involved are situate, whenever it is ordered by the order directing such trial or by any other order made by the court in the cause.

2A:62-17. Persons entitled to maintain action

When a person claims to be entitled to a vested estate in remainder in lands in this state or to remainder interest in personalty and his title thereto, or any part thereof, is denied or disputed, or another person claims or is claimed to own the same, or any part thereof or

interest therein, or to hold a lien or encumbrance thereon, and no action to which he is a party is pending to enforce or test the validity of any alleged title, interest, claim, lien, or encumbrance, the person claiming to be titled to the estate or in interest may maintain an action in the superior court to settle the title to the estate or interest and to clear up all doubts and disputes concerning the same.

2A:62-18.Jury trial; issues; adjudication by court

Upon the application of either party, a jury trial shall be directed to try the validity of the claims made to the estate or interest, or to settle the facts, or any specified portion of the facts upon which the same depends.

When such jury trial is not requested, or as to the facts for which the same is

not requested, the court shall proceed to inquire into and determine such claims, interest and estate, and shall, upon the verdict, or upon such inquiry and determination, finally settle and adjudge whether the defendant has any estate, interest or right in or encumbrance upon said estate in remainder in said lands or remainder interest in said personalty, or any part thereof, and what the same is and in or upon what part of said lands or personalty the same exists.

STATEMENT OF THE CASE

Petitioner, Maxine L. Mastropietro, and respondent, Robert A. Mastropietro, were married on August 4, 1973. On September 11, 1980 the parties were divorced by Dual Final Judgment of Divorce, Superior Court of New Jersey, Chancery Division, Somerset County, Docket No M-8660-79 (a1-a9)

Three children were born of the marriage: Brian Mastropietro, born February 17,1975, Michael Mastropietro, born May 24, 1976 and Jeffrey Mastropietro, born May 9, 1978.

The parties stipulated for the record a property settlement agreement which was incorporated in the Final Divorce Judgment. Paragraph 4 of the Final Judgment specifically addressed disposition of the marital residence. A court appointed appraisor was to

establish a fair market value for said property; for one half of said appraised value, plaintiff would transfer all of her interest in said property to the defendant; title would vest with the defendant on performance of an executory condition:

> "The condition of this conveyance, however, shall be the continued occupation of the said [residence] by the defendant and the infant children solely, or with defendant's wife should he remarry, until the last child graduates from high school, this condition being the basis on which this arrangement and custody have been made between plaintiff and defendant." (a5)

This executory property condition was expressly set forth on the deed to the property. (a13)

On June 19, 1985 respondent, represented by counsel, filed a motion with the Superior Court of New Jersey, Chancery Division, seeking to rescind

this executory property condition. Respondent also sought to restrict petitioner's extensive and unlimited visitation with the minor children of the parties. Respondent's motion was supported solely by his certification. No legal brief accompanied respondent's papers.

Petitioner, pro se, filed a certification in opposition to respondent's motion (a23-a30) and, on July 12, 1985, oral argument was held before the Honorable Michael R. Imbriani, JSC (a30-a40)

At the conclusion of oral argument, Judge Imbriani denied respondent's application to restrict visitation, but granted his motion to amend the divorce judgment with respect to the condition of his continued residence of the marital home. (a39)

On July 15, 1985 Judge Imbriani

signed an Order permitting respondent to move from the marital residence, but forbidding him from moving more than 3 miles from petitioner's home. (a40-a43)

On July 22, 1985 respondent filed a second motion seeking Reconsideration of the July 15th Order. On August 2, 1985 oral argument again took place before Judge Imbriani. In his oral opinion of that date Judge Imbriani modified his Order of July 15th, thus permitting respondent to move up to 4.1 miles from petitioner's home.

On August 9, 1985 another Order was signed by Judge Imbriani. (a55-a58)

On September 6, 1985, petitioner, pro se, filed a Notice of Appeal with the Superior Court of New Jersey, Appellate Division.

On September 25, 1985, present counsel was substituted for petitioner pro se.

On April 30, 1986, the Superior Court, Appellate Division, affirmed the decision of the trial court. The Court held that the trial court had discretion under Rule 4:50 to vacate the judgment, that it had not abused its discretion, and that the time requirements of Rule 4:50-2 had not been violated. Petitioner's Constitutional Arguments were ignored. (a94-a102)

On May 29, 1986 petitioner filed a petition for Certification with the New Jersey Supreme Court seeking to reverse the decision of the Appellate Division. On June 27, 1986, the Supreme Court denied the petition for Certification, declinig to consider the case. (a105) Because the New Jersey Supreme Court declined to consider the case, the instant petition for certiorari is brought to review the decision of the Superior Court of New Jersey, Appellate

Division. (Western_Union_Telegraph_Co_v Priester 276 US 252, 48 S Ct 234 (1928); Michigan-Wisconsin_Pipeline_Co_v_Calvert 347 US 157, 74 S Ct 396 (1954).

Each of the federal questions raised by petitioner was raised at an appropriate time in the State Court proceedings:

1 The first question raised by petitioner is whether the failure of both the trial court and the Appellate Division, to follow required procedures, and to apply proper standards under the existing New Jersey law, resulted in a denial of Due Process and Equal Protection under the 14th Amendment to the US Constitution.

The first such failure concerned the time standards under New Jersey law for service of motion papers. Rule 1:6-3 of the Rules Governing the Courts of the State of New Jersey, quoted above,

requires service of motion papers at least 14 days prior to the return date of the motion.

Petitioner was served with respondent's motion papers on July 22, 1985. The motion was returnable on August 2, 1985, eleven days later. Petitioner raised this point in her Certification in Opposition. (a44-a45)

The next rule which was violated was Rule 4:42-1 (quoted above) which requires that the party not submitting an order be afforded the opportunity to be heard by the judge concerning the form of the order, prior to its execution by the judge.

This rule was violated with respect to both Orders entered by the trial court, the Order of July 15, 1985 (a40-a43) and the Order of August 9, 1985 (a55-a58).

Again, petitioner, although pro se

at the time, immediately raised this point at the trial level.

With respect to the July 15, 1985 Order, the issue was raised in petitioner's Certification of July 26, 1985 at paragraph 11 (a48-a49). With respect to the August 9, 1985, Order, it was raised in Petitioner's Certification in Support of her Motion to Clarify the Form of the Order (a61-a62).

At the Appellate level this issue was raised at page 2 and again at page 4 of petitioner's brief in support of her appeal (a64-a66). It was again raised at page 7-10 of petitioner's Reply Brief on appeal (a91-a93).

The next failure to apply proper standards concerned the requirements for vacating judgments under Rule 4:50 quoted above. At no point in the proceedings did respondent set forth any extaordinary circumstance which would permit a 5 year

old judgment to be vacated, as required by clear New Jersey case law. (see infra for full discussion).

This point was raised by petitioner in her initial Certification in Opposition, dated July 5, 1985, at paragraph (4). (a25)

It was again raised at oral argument by petitioner on July 12, 1985 (July 12 Transcript at page 14, a36-a38)

At the Appellate level the argument was raised at page 6, 12, 14-17 of petitioner's brief on appeal (a68,a73,a75-a81). It was raised again as the first question presented at page 5 of petitioner's Petition for Certification to the New Jersey Supreme Court. (a103)

The next violation of State procedural rules was respondent's failure to meet the time requirements for the bringing of a motion to vacate a judgment

under Rule 4:50-2. This issue was raised in petitioner's Appellate Brief at page 18-20 (a83-a88), and again as Question (2) on page 5 of her Petition for Certification to the New Jersey Supreme Court (a103).

The final violation of State procedural rules was the failure of the trial court to provide petitioner with a fair opportunity to present her opposition to respondent's motion at a plenary hearing.

This point was raised in petitioner's Certification in Opposition to Motion to Modify Dual Final Judgment of Divorce at paragraph (13) (a29), petitioner's Appellate Brief at page 23 (a88), and again in her Petition for Certification to the New Jersey Supreme Court as question (3) on page 5 (a104).

II The second question raised by petitioner is whether she was deprived of

parenting rights guaranteed by the 1st, 9th and 14th Amendments to the US Constitution, by the State court's decision to summarily amend a 5 year consent judgment, setting forth a parental choice with respect to where the children should live.

The issue was first raised by petitioner in her July 5, 1985 Certification in Opposition to the original motion (a24-a25). It was again raised at oral argument of the Motion (July 12, 1985 Transcript at page 7, 10, 12, 15)(a30-a40)

It was raised again at the appellate level at page 9-10 of petitioner's Appellate Brief (a69-a73), and as question 5, at page 5 of her Petittion for Certification to the New Jersey Supreme Court (a104).

III The final question raised by petitioner is whether she was deprived of

Due Process and Equal Protection under the 14th amendment, by being ordered to relinquish valuable reversionary property rights without benefit of an evidentiary hearing: specifically guaranteed under New Jersey law.

This point was raised in petitioner's brief on appeal at page 20-23 (a87-a90) and again as question (4) on page 5 of her Petition for Certification to the New Jersey Supreme Court (a104).

REASONS FOR GRANTING THE WRIT

1. AT EVERY LEVEL OF THIS PROCEEDING, PROCEDURAL SAFEGUARDS AND SUBSTANTIVE STANDARDS REQUIRED BY NEW JERSEY LAW WERE VIOLATED. THE RESULT WAS THAT PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION GUARANTEED BY THE 14TH AMENDMENT

Although states are generally left free to regulate the procedures of their judicial systems without fear of federal interference, where those procedures, either as formulated, or as carried out

in a specific case, violate a basic principle of justice, the United States Supreme Court has not hesitated to step in to remedy the injustice:

"The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental' (Snyder v Massachusetts 291 US 97)...But the freedom of the state in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law." 1 Brown v Mississippi 297 US 278, 285

1. Though Snyder, Brown, Chambers and Rideau are all criminal cases, the Supreme Court has not hesitated to apply similar principles in the context of civil litigation (Marshall v Jerricho, Inc 446 US 238, 242 (1980); Carey v Piphus 435 US 262 (1978)

(1936)(cf Chambers_v_Forida 309 US 227 (1940): Rideau_v_Louisiana 373 US 723 (1963)).

In the instant case, petitioner does not question the power of the State of New Jersey to formulate substantive and procedural standards and guidelines for the administration of the judicial system within the state. Nor does she question the Constitutionality of those standards which are applicable to this case. What she does question is the constitutionality of the actions of the state courts in applying, or in failing to apply, those standards in this case.

From the outset of this case, clear guidelines of judicial procedure were violated by respondent with the acquiescence of the trial judge, and by the court itself:

(1) Rule 1:6-3 of the Rules Governing the Courts of the State of New

Jersey (set forth above) requires that motion papers be served on all parties at least 14 days prior to the return date. On July 22, 1985, petitioner was served with motion papers returnable 10 days later. As a result, petitioner was not afforded sufficient time to obtain counsel and was forced to represent herself at oral argument of the motion (Petitioner's Certification of July 26, 1985, paragraph 2,3,10: a44-a45,a48). It was certainly for the very purpose of avoiding such an injustice that the minimum time requirements of Rule 1:6-3 were promulgated by the New Jersey Supreme Court. Yet in this case these requirements were ignored.

(2) Rule 4:42-1, permits the form of an order to be settled in one of two ways: (a)"..Settlement by Motion or Consent...no...order shall be signed by the court unless the form thereof has

been settled on motion on notice to all parties affected thereby...or unless the written approval of such attorneys or parties to the form thereof is endorsed thereon..."; or (b) "Settlement on Notice. In lieu of settlement by motion or consent the party proposing the form of...order may forward the original thereof to the judge who heard the matter and shall serve a copy thereof on every other party...together with notice advising him that unless he notifies the judge and the proponent of the judgment or order in writing of his specific objections thereto within 5 days after such service, the...order may be signed in the judge's discretion."

The purpose of this rule is to insure that an oral decision of a trial court is accurately reflected in the written order arising therefrom, and to insure that the party not submitting the order is

afforded an opportunity to be heard on the form of the order prior to its execution.

Two orders were executed in this case, one dated July 15,,1985 (a40-a43), and the other dated August 9, 1985 (a55-a58). In both cases the requirements of Rule 4:42-1 were clearly ignored. With respect to the July 15th Order, petitioner received a copy of an already executed Order on July 17th (July 26th Certification at para 11, a48). She obviously had no input into its form or content.

Moreover, there was a very real problem with the content of that Order, as petitioner stated in her July 26th certification at paragraph 11. The Order submitted by respondent's counsel failed to specify that the deed to any new residence purchased by respondent, must contain the same condition (that

respondent may not move with the children to a new residence until the youngest child finishes high school) as the condition found in the current deed. This, despite the fact that Judge Imbriani clearly ordered this in his oral decision. (July 12, 1985 Transcript at page 25, a39). This was a very important part of the judge's overall decision and its omission from the order adversely affects the rights of petitioner. It was to avoid such an injustice, that Rule 4:42-1 was originally promulgated. Had petitioner been afforded the opportunity, required by the Rules, to be heard on the content of the order, prior to its execution, the order would have more accurately reflected the judge's actual decision, and petitioner's rights would have been protected.

A very similar situation occurred with respect to the August 9th Order

which arose from the August 2nd oral argument of respondent's motion for reconsideration.

This time, respondent's attorney did attempt to comply with Rule 4:42-1. A proposed order was submitted to the judge on August 6, 1985. A copy was forwarded to petitioner, as required. However, Judge Imbriani signed the Order on August 9, 1985, before the expiration of the 5 day period for objections, required by Rule 4:42-1(b); he did not consider the objections expressed by petitioner in her letter of August 8, 1985, although those objections were submitted well within the 4:42-1(b) time frame. (a61) The judge himself was concerned with the propriety of his actions and wrote to respondent's counsel expressing his concern on September 6, 1985, upon reading petitioner's letter of objections for the first time. (a58-a59)

Unfortunately, the judge ultimately declined to remedy the situation as expressed in his letter of September 17, 1985 (a59-a60), and in his denial of petitioner's Motion to Clarify Order of August 9, 1985 and to Stay Execution of the Order Pending Appeal.

The reason the judge gave for declining to correct this error, was that petitioner had appealed the order, and it would be improper for him to amend an order already on appeal. This reasoning is clearly erroneous. The fact that a litigant plans to appeal an Order, does not mean that her right to have input into the form of that order under Rule 4:42-1 is lost. Where an appeal is filed it is very important that the written order accurately reflect the oral decision of the trial court so that the Appellate tribunal may render a fair decision based upon the record below.

(3) The third, and perhaps the most serious error made by the state courts in this case, was their failure to apply the correct standard, under Rule 4:50, as to when a judgment may be set aside after the time to appeal that judgment has expired.

Rule 4:50, set forth above, lists 6 grounds on which judgments may be set aside. The first 5, (a) through (e), deal with fraud, mistake, newly discovered evidence, discharge, and so on. These clearly do not apply in this case. Subparagraph (f) is a catch-all provision which allows judgments to be set aside for "any other reason justifying relief from the operation of the judgment or order".

Over the years New Jersey Appellate Courts have wrestled with the question of when a trial court may properly set aside a judgment pursuant to Rule 4:50-1(f).

Two rules have evolved:

(1) The decision as to whether a judgment may properly be set aside is up to the discretion of the trial judge. Such a decision will be sustained by an appellate court, "...in the absence of an abuse of discretion." (Court Investment Co v Perrillo 48 NJ 334, 341 (1966))

(2) However, relief from Judgment under Rule 4:50-1(f) is permitted "...only when truly exceptional circumstances are present." (Bauman v Marinaro 95 NJ 380, 385 (1984): only where enforcement of the order would be "...unjust, oppressive or inequitable." (Quagliato v Bodner 115 NJ Super 133, 138 (App Div 1971): and only where "...there is a showing of extreme hardship and the equities clearly run in favor of the party applying for relief from the judgment." (Doyle v Chase Manhatten Bank 80 NJ Super 105, 125 (App Div 1963).

Thus, for a lower order, setting aside a judgment under this rule, to be sustained, there must be a finding of some truly extraordinary circumstances to justify the relief. In the absence of such a finding, it is an abuse of the trial court's discretion to set aside the judgment.

There is no question that this is the standard under which Rule 4:50-1(f) motions are considered. This was acknowledged by the Superior Court, Appellate Division in its opinion at page 4-5 (a45). What that court failed to do however, was to set forth any extraordinary circumstances in the record which would justify the exercise of the trial court's discretion under Rule 4:50-1(f), any explanation as to how enforcement of the Order would be unjust or oppressive or inequitable, or any explanation as to how the equities could

be said to clearly favor respondent: "While we recognize that relief from a judgment is permitted under R.4:50-1(f), 'only when truly exceptional circumstance are present' (Bauman v Marinaro 95 NJ 380, 395 (1984)...we cannot fairly say that the trial judge mistakenly exercised his discretion in this case." (App Div opinion, a100)

No discussion of the facts in the record followed this statement. Nor is there any discussion elsewhere in the opinion as to what, if any, extraordinary circumstances the court relied on to support the trial court's decision. The reason seems obvious. There simply were no extraordinary circumstances set forth by respondent which would justify relief under Rule 4:50-1(f).

In 1980 respondent voluntarily entered into an agreement to resolve all issues concerning custody, visitation,

and disposition of marital property. Since then, petitioner fulfilled all of her obligations under that agreement and respondent reaped substantial benefit from it.

Five years after the consent judgment was entered, respondent went back to court seeking relief from paragraph 4 of the judgment, which conditioned the conveyance of the marital property to respondent on his continued occupancy of the home with the minor children.

The basis of respondent's application was not a claim that the agreement was unjust or inequitable when entered into, or that petitioner had done anything since the agreement to render it unjust or inequitable to enforce it now. Nor did respondent claim fraud, mistake, change of law, or any other recognizable equitable ground for relief from

judgment. Instead respondent based his application solely on the fact that in 1983 his new wife had given birth to another child making the current residence too small, in his (respondent's) opinion.

It is very significant that the trial judge never made a finding of fact that the house was in fact too small.2 The judge simply concluded that if respondent considered it too small he would be permitted to move:

> "In other words, I felt that if it was necessary, in the opinion of Mr. Mastropietro to sell the home , that home, I would permit him to do so." (Transcript of Aug 2 at pg3, a52, emphasis supplied)

Such a circumstance simply does not

2. The Appellate Division mischaracterized the trial court record when it stated "citing the crowded nature of defendant's present living conditions, the trial judge granted the motion to modify the judgement of divorce."(App Div opinion page 3, a79)

constitute sufficient grounds for relief from judgment under controlling caselaw in the State of New Jersey.

First, and most obvious, the equities do not clearly run in respondent's favor.(Doyle , supra) Quite the contrary. The birth of another child was a foreseeable circumstance in 1980 when respondent agreed to remain in the marital home. He was 28 years old at the time and had already fathered 3 children. The possibility of remarriage was, in fact, explicitly provided for in paragraph 4 of the 1980 judgment. (a5) And the possibility that children would follow was certainly not remote.

Moreover, enforcement of the judgment would not be unjust or oppressive to respondent (Guagliato , supra). As petitioner argued in her Certification in Opposition (a26, para 5) and again at oral argument (July Transcript pg7, a31),

if respondent felt he needed more room he could have simply added on to the marital residence at no greater cost or inconvenience than moving to a new residence would involve. This point was totally ignored by both the trial court and the Appellate Division, but is pivotal to a proper decision in the case.

For, in agreeing to remain in the marital residence until the children graduated from high school, respondent implicitly agreed that if he needed more room for his family, he would have only one option--to add on to his existing residence. He gave up his other obvious option to move to a larger residence. And in no way was that an unfair, or an unconscionable agreement. It was entered into voluntarily and substantial benefit was derived by respondent in exchange for that property condition. In no way would it be unjust or inequitable to hold

respondent to the obligation of his bargain, after he has already reaped the benefits of that bargain.

New Jersey caselaw is unanimous on this point. In no reported case interpreting the scope of R.4:50-1(f) has relief been afforded where, as here, there is such a clear absence of exceptional circumstances to mandate relief, and where the equities clearly favor the non-moving party rather than the moving party.

Though the Appellate Division cited several cases in support of its decision, at pages 4-5 of its opinion, a close examination of those cases reveals that none truly supports its holding.

In several of the cases cited, relief under R.4:50-1(f) was actually denied: cf Ganther v Ganther , 153 NJ Super 226 (App Div 1977): Quagliato v Bodner , supra: Bauman v Marinaro ,

supra; Gulick v Gulick, 113 NJ Super 366 (Ch Div 1971).

And in those cases where relief was granted, the moving party had always been able to demonstrate exceptional circumstance warranting extraordinary relief under R.4:50-1(f): in Edgerton v Edgerton, 203 NJ Super 160 (App Div 1985), the Legislature had recently changed the law and removed inherited property from the reach of the equitable distribution statute. The divorce judgment was modified only to reflect the new law (which had already been given retroactive effect in Gibbons v Gibbons, 86 NJ 515, 524 (1981)). In Court Invest Co. v Perillo, 48 NJ 334 (1966), a 20 year old default judgment was vacated, but only after the Court determined that the default had been procedurally deficient to begin with, that defendant's attorney had been subjected to disbarment

proceedings 18 days after the complaint had been served upon defendant, and was thus incapable of handling the case at the time; that "...plaintiff's attempt to revive the abandoned summons amounts to inequitable conduct" (Perillo at 344); and that "...the equities strongly favored defendant" (Perillo at 347). In Hoagson v. Applegate , 31 NJ 29 (1959), the motion to vacate under R.4:50-1(f) was made only 34 days after entry of judgment, before the time to appeal had expired. The motion was based on allegation of fraud, newly discovered evidence, and trial errors; and it was granted only after the Court determined that defendant had not appealed due to a mistake on his attorney's part. In Manning Engineering v. Hudson Cty Park Comm , 24 NJ 113, 120 (1977), a R.4:50-1(f) motion for relief from judgment under a contract was granted,

only after a determination that the contract had been fraudulently and illegally entered into, and that to enforce such a contract would violate the very strong public policy against enforcement of illegal contracts (Manning at 123-125). Finally, in Palko v. Palko , 73 NJ 395 (1977), the Court was faced with plaintiff wife's allegations that her husband had intentionally and willfully withheld material information as to the value of his holdings during negotiation of a property settlement agreeement incorporated into a divorce judgment. The Court however, did not hold that the requirements of R.4:50-1(f) had been met, only that the wife was entitled to a hearing on this issue.3

Here, where there was no allegation

3. In this case, plaintiff, the non-moving party, was not even afforded a hearing. This point will be developed below

of fraud, mistake or change of law; and where there was no evidence that enforcement of the judgment would be unjust or oppressive to respondent, the moving party, it was clearly improper for respondent's motion to have been granted.

The decision of the trial court was based, not upon accepted principles of law, but, rather, upon the arbitrary whim of the court. Such a decision violates clear precedent in New Jeresey law, as well as, the Due Process and Equal Protection Clause of the U.S. Constitution as construed by the U.S. Supreme Court:

> "This discretionary authority [in Rule 4:50 cases] is legal and not arbitrary in character; it must be exercised in consonance with established principles of law...judicial discretion, to borrow the words of Lord Mansfield, means "sound discretion guided by law and not by whim or humor.'" (LaBell v Quasdorf

116 NJL 366, 372 (Sup Ct 1936) citations omitted)

In deciding when an error of a state court will constitute a denial of Due Process, the Supreme Court has said:

> "...the Fourteenth Amendment is not a guarantee that a trial shall be devoid of error. To bring about a taking without due process of law by force of such a judgment, the error must be gross and obvious, coming close to the boundary of arbitrary action." (Roberts v City of New York 295 US 264, 277 (1934)(emphasis supplied, citation omitted)(cf Chicago Life Ins Co v Cherry 244 US 25 (1917), Marshall v Jericho Inc , supra))

Here the decision of the trial court, affirmed by the Appellate Division, crossed way over the boundary of arbitrary action. The only explanation for the decision was that the trial judge felt that respondent should be permitted to move. This decision was not based upon the facts of the case or

upon any legal precedent. It was simply the opinion of the judge that respondent should be allowed to move. Such a decision, with no legal basis for it, constitutes arbitrary action in violation of the Due Process Clause of the 14th Amendment.

In the context of an application for admission to a state bar, the U.S. Supreme Court emphasized the principle that where important rights are at stake, there must be some basis in fact and law for a decision infringing upon those rights:

> "Even in applying permissable standards, officers of a state cannot exclude an applicant where there is no basis for their finding that he fails to meet those standards, or when their action is insidiously discriminatory." (Schware v Bd of Bar Examiners of the State of New Mexico 353 US 232, 239 (1957)

Here the standards for consideration

of a motion under Rule 4:50-1(f) were clearly set forth in state caselaw. Under those standards there was no factual or legal basis for the Court to grant respondent's motion. The action of the Court violated the Equal Protection, as well as, the Due Process Clause of the 14th Amendment:

> "Though the law itself be fair on its face, and, impartial in appliance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." (Yick Wo v Hopkins 118 US 355 (1886) (cf Schwarc , supra))

Petitioner had a Constitutional right to be treated the same as any other citizen of the State of New Jersey with respect to her rights under a valid judgment of a Court of the State of New

Jersey. The decision of the trial court, affirmed by the Appellate Division, to arbitrarily alter the terms of the judgment violated her Due Process and Equal Protection rights protected by the 14th Amendment.

(4) The next error of Constitutional proprtions, made by the state courts, was their failure to apply the proper standard, under Rule 4:50-2, as to whether a motion to vacate a judgment has been made within a reasonable time.

There is very good reason for the time requirements of Rule 4:50-2:

> "The principle of finality of judgments is one of repose. It dictates that litigation must eventually be ended and that at some point the prevailing party be allowed to rely confidently on the inviolability of his judgment." (Hodgson v_Applegate supra at 43)

And as the U.S. Supreme Court said in Ackerman_v_United_States 340 US 193,

198 (1950):

> "There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."

Here respondent made a free, calculated and deliberate choice in 1980 to remain in the marital residence until his youngest child graduated from high school in order to gain ultimate possession of the property.

In Falco v Falco supra, the New Jersey Supreme Court was faced with an application to set aside a property settlement agreement incorporated into a divorce judgment. In considering the timeliness of that application, the court said at 398:

> "A significant element in the timeliness of plaintiff's motion, noting the structures of the rule, would consist of the date when plaintiff first discovered the facts underlying her application..."

In this case, the fact underlying the

application was that defendant had another child and that he felt he needed more living space for that child. Defendant first discovered this fact in about October, 1982, when the child was conceived (born June, 1983). Yet respondent waited 33 months, until June, 1985, before he applied for relief from the judgment.

The Appellate Division dismissed petitioner's timeliness argument in one sentence:

> "While defendant may have anticipated earlier the problems that ultimately compelled him to seek relief from the divorce judgment, this delay was not prejudicial to plaintiff and was understandable in light of the gradually increasing need for living space as the children grew older." (App Div opinion at page 5)

Here the court ignores the very reason for the existence of Rule 4:50-2, that at some point litigation must be

endeo. and that the prevailing party must at some point be alloweo to rely upon the inviolability of her judgment.

This was not an initial trial of an unlitigated marital issue. This was a motion for relief from a 5 year old judgment.

Prejudice to a non-moving party from the setting aside of an old judgment is presumed. It need not be proven.

Otherwise there would be no reason to have a rule as R.4:50-2 at all. Very significantly, respondent offered no explanation for the 3 year delay in bringing the motion. Once again, the state courts ignored established standards to reach the result they wanted. Such arbitrary action is a violation of the Due Process Clause of the 14th Amendment.

(5) The final major procedural error

committed by the state courts was their denial to petitioner of a plenary hearing to resolve disputed issues of fact.

The importance of a plenary hearing as a guarantee of due process has been repeatedly recognized by both Federal and New Jersey State Courts:

> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Goldberg v Kelly 397 US 254, 269 (1970)(Eg Arnett v Kennedy 416 US 134 (Marshall dissenting)(1974); Cleveland Bd of Educ. v Loudermill 105 S Ct 1482 (Brennan concurring in part, dissenting in part)(1985))

This principle has recently been emphasized in New Jersey in the context of a motion made pursuant to Rule 1:6-2. In Fusco v Fusco 186 NJ 321 (App Div 1982), the Appellate Division reversed a trial courts denial of a plenary hearing

in the context of a matrimonial motion. The Fusco Court expressly disapproved of the trend in New Jersey towards deciding disputed issues based upon written certifications alone:

> "It was never the intention of these rules to dispense with due process altogether by eliminating the necessity of an evidential basis of decision. These rules consequently have absolutely no applicability at all when the matter before the court is not one which can be decided on papers but is rather one which requires findings of facts on properly adduced evidence. In short, if the proper disposition of a matrimonial dispute requires a plenary hearing, the dispute is by definition not subject to disposition on papers, with or without oral argument. Moreover, disputes implicating the welfare of a child and involving conflicting contentions and opinions of lay and expert affiants must be submitted to a plenary hearing."(Fusco at 329)

In this case, despite very obvious factual disputes, petitioner was denied an evidentiary hearing. The Appellate

Division denied petitioner's contention that she was entitled to such a hearing:

> "We conclude from the record that there was no genuine issue of material fact. We thus, find that the trial judge did not abuse his discretion in denying an evidentiary hearing."(App Div opinion at page 5)(a97)

This conclusion is incredible in light of the record before the court. An examination of that record reveals that the trial court did not make any findings of fact in the course of its oral decisions, after argument on July 12th and August 2nd.

The record reveals further that the three key factual issues at the very heart of this matter remain very much in dispute:

(1) Whether the current residence is actually too small for respondent and the children? Respondent claimed in his Certification (a18) that it was;

petitioner disputed this claim in her Certification (a26). This is a threshhold factual issue, which the trial court never addressed, holding only that, if respondent felt it was necessary to sell the home, he would be permitted to do so. (Aug Transcript pg3, a52)

(2) If respondent could establish as fact that the living conditions are harmful or oppressive, whether respondent is capable of his own relief within the bounds of the agreement and judgment? Petitioner raised the issue (Certification at para 5, a26) that respondent could add-on to the residence at no greater cost than moving. The trial judge simply assumed it would be more expensive, with no proof to support his assumptions (July Transcript at page 7, a31-a32)

(3) Whether the children are best nurtured by remaining in their current home or by moving to a new residence?

Petitioner raised concerns of harm to the children relative to the proposed move (Certification at paras 6,7, & 12; a26-a29) (July Transcript pg 10, 14;a32-a33, a36)(August Transcript pg 10, 12; a50-a55); the trial court, as did respondent, minimized these concerns with generalizations (July Transcript page 10 to 11; a33);the trial court record indicates the decision was based on repondent's opinion (August Transcript a52); the App Div opinion indicates their interpretaion was that the decision was based on the "the best interests of the family unit"(a98). No facts were established specific to these children. Most significantly, no facts of harm, relative to current conditions, were established warranting government intervention as parens patriae in a parenting decision.

If concern for the welfare of the

children is integral to this case, that issue should be fairly decided at a hearing (Fusco v Fusco , supra).

In Barrie v Barrie , 154 Super 301 (App Div 1977), plaintiff wife moved to rescind a property settlement agreement on the basis that she had been incompetent to contract. Unlike this case, the motion to vacate and the request for a hearing were both denied. The Court would not even consider the possibility of granting the motion without a hearing:

> "There is, of course, no doubt that plaintiff was not entitled to either a reopening of the judgment or to a recission of the settlement agreement merely by virtue of her affidavit and certification. The fundamental issue before us is whether she was entitled to an evidentiary hearing on the basis of the record made below." (Barrie at 303)

In this case, petitioner raised substantial factual issues which were not resolved. It was error for the Court to grant the motion, and for the Appellate Division to affirm without an evidentiary hearing on disputed factual issues. (Goldberg v Kelly , supra)

2. THE DECISION OF THE TRIAL COURT, AFFIRMED BY THE APPELLATE DIVISION, TO OVERRIDE A 1980 PARENTAL CHOICE AS TO WHERE THE CHILDREN OF THE PARTIES SHOULD LIVE, IN THE ABSENCE OF ANY EVIDENCE THAT THAT PARENTAL CHOICE WAS HARMFUL TO THE CHILDREN, DEPRIVED PETITIONER OF HER PARENTING RIGHTS IN VIOLATION OF THE 1ST, 9TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION

The United States Supreme Court has reiterated time and again the great deference which must be shown to a parent's right to raise her children as she sees fit:

> "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'comes to this court with a momentum for respect lacking when appeal is

> made to liberties which derive merely from shifting economic arrangements'... The rights to conceive and raise one's children have been deemed 'essential', 'basic civil rights of man and rights far more precious ...than property rights'.'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations that state can neither supply or hinder'. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment."(Stanley_v_Illinois 405 US 645, 651 (1972)(citations omitted)(cf Lassiter_v_Dept_of Social_Services 452 US 18, 27 (1981) .

The right to determine where one's children should live is clearly part of a parent's interest in the "custody, care, and nurture" of her children, and this is included in those parenting rights protected by the U.S. Constitution. Here the determination as to where the

children should live until they finish high school was explicitly made by the children's parents in 1980. In the absence of any evidence that that parental choice was harmful to the children, it was improper for the State of New Jersey to intervene and substitute its own judgment for the judgment of the children's parents. The trial judge made no findings of fact that the children would be harmed by remaining in the marital home:

> "...I felt that if it was necessary in the opinion of Mr. Mastropietro to sell the home, that home, that I would permit him to do so." (August Transcript at pg, a52)

Such a holding interfered with petitioner's parenting decision, expressed in paragraph 4 of the original divorce judgment, in violation of the Constitution of the United States.

3. THE TRIAL COURT ORDER REQUIRING PETITIONER TO RELINQUISH HER REVERSIONARY INTEREST IN THE MARITAL PROPERTY WITHOUT BENEFIT OF AN EVIDENTIARY HEARING, OTHERWISE REQUIRED BY NEW JERSEY LAW, VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE 14TH AMENDMENT.

The Legislature of the State of New Jersey has set up a procedure for the determination of disputes concerning the ownership of interests in real property in this state. That procedure is as follows:

1. A person in peaceable possession of lands may bring an action to quiet title in the Superior Court where his title thereto, or any part thereof, is denied or disputed. (N.J.S.A.2A:62-1 set forth above)

2. A person, not in possession of lands, but claiming a future interest in those lands, may maintain an action in the Superior Court to settle the title to the land. (N.J.S.A.2A:62-17, set forth above) Once again either party has the right to

trial by jury (N.J.S.A.2A:62-18, set forth above)

On January 14, 1981, petitioner conveyed her interest in the marital property at 71 Highland Avenue, Bridgewater, New Jersey to respondent subject to the condition that,

> "4....The condition of the conveyance, however, shall be the continued occupation of the said [residence] by the defendant and the infant children solely, or with defendant's wife should he remarry, until the last child graduates from high school..." (property deed, a14)

Thus, in June, 1985, when respondent brought his motion to amend the divorce judgment, petitioner retained a valuable interest in the marital property.4

Respondent sought an order

4. There is some question as to whether the interest would be delineated as a reversion or as a reverter (cf Oldfield v Stoeco Homes Inc 26 NJ 246 (1958). This issue is irrelavant however to the current inquiry.

extinguishing petitioner's rights in the property. Under very clear statutory law, the correct course for respondent to have taken was to bring an action to quiet title under N.J.S.A.2A:62-1. Petitioner would then have had the right to defend against such an action, including the right to full trial by jury (2A:62-4).

Instead petitioner's valuable property rights were taken from her on motion based on Certifications alone. She not only was denied a trial by jury; she was denied a trial period. The action of the state courts thus clearly constituted a violation of the Due Process and Equal Protection Clauses of the 14th Amendment:

> "The requirements of the 14th Amendment are satisfied if trial is had according to the settled course of judicial procedure obtaining in the particular state, and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of government." (Minder_v

Georgia 183 US 559 (1901) (cf. Yick Wo v Hopkins, supra))

Trial in this case was clearly not had according to the settled course of judicial procedures. Instead, petitioner was denied her statutory right to a trial of all issues concerning her rights under the January 14, 1981 deed, with no possible justification for such a denial. The state courts' action was thus a clear violation of the Due Process and Equal Protection Clauses of the 14th Amendment.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Superior Court, Appellate Division, State of New Jersey.

Respectfully submitted,
Daniel L. Martin
356-12 Gemini Drive
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New Jersey 08876
Counsel for Petitioner

September 25, 1986

86-508

Supreme Court, U.S.
FILED
SEP 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO._____

SUPREME COURT OF THE

UNITED STATES

A P P E N D I X

MAXINE L. MASTROPIETRO, PETITIONER

V.

ROBERT ALAN MASTROPIETRO, RESPONDENT

ON WRIT OF CERTIORARI TO THE

SUPERIOR COURT OF NEW JERSEY,

APPELLATE DIVISION

PETITION FOR WRIT OF CERTIORARI

Daniel Martin, Esq

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So Somerville, NJ

10 APP

ORIGINAL FILED TRENTON
Duplicate hereof filed with
the Somerset County Clerk
on 9/11/80
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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, SOMERSET COUNTY
DOCKET NO. M-8660-79

MAXINE L. MASTROPIETRO,
plaintiff,
-vs-
ROBERT A. MASTROPIETRO,
defendant

CIVIL ACTION
DUAL FINAL
JUDGMENT
OF DIVORCE

This matter coming on for hearing on August 19, 1980, the Honorable Michael R. Imbriani, J.S.C., presiding, in the presence of Libby E. Sachar, Esq.,of Sachar, Pernstein, Rothberg, Sikora & Mongello, Esqs., Attorneys for Plaintiff, and Leroy P. Lusardi, Esq., Attorney for Defendant, and upon both plaintiff and

defendant having withdrawn their answers to complaint and counterclaim, and the Court having heard and considered the proofs in this action and the argument of counsel, and it appearing that the plaintiff and defendant were joined in the bond of matrimony on August 4, 1973, and the plaintiff and defendant having pleaded and proved a cause of action for divorce under the statute in such case made and provided, and the plaintiff and defendant having been bona fide residents of the State of New Jersey for more than one year next preceeding the commencement of this action and jurisdiction having been acquired over the defendant pursuant to the rules governing the courts:

It is on this 11th day of September, 1980, ORDERED AND ADJUDGED by virtue of the power and authority of this Court and the acts of the legislature in such case made and provided, and the said Court

does hereby ORDER AND ADJUDGE that the plaintiff, Maxine L. Mastropietro, and the defendant, Robert Alan Mastropietro, be divorced from the bond of matrimony for the cause aforesaid and that the said parties, and each of them, be freed and discharge from the obligations thereof, and that the marriage between the parties is hereby dissolved, and it appearing that the parties hereunto have stipulated for the record a property settlement agreement providing for the disposition of all collateral issues usually attendant upon matrimonial litigation, which the parties are ordered to carry out, and which said agreement is as follows:

1. The defendant shall have the custody of Brian Mastropietro, born February 17,1975, Michael Mastropietro, born May 24, 1976, and Jeffrey Mastropietro, born May 9, 1978, until further of the Court.

2. The plaintiff shall have unlimited right of visitation with the said infant children on giving the defendant 48 hours notice of her intention to exercise said visitation, which visitation shall include vacation periods and overnight visits.

3. Defendant shall be responsible for all of the support and maintenance of the said infant children, including but not limited to their medical, dental, drug, and education expenses. The defendant shall not be responsible for any expenses for the said children. There shall be no alimony provided for plaintiff.

4. Plaintiff and defendant are the owners of premises known as the marital residence at 71 Highland Avenue in Bridgewater Township, New Jersey. An appraisal of the market value of said premises shall be made by George Sopko, of 58 North Bridge Street, Somerville,

designated by the Court to make such appraisal. The cost of said appraisal shall be borne equally by the plainriff and defendant. Within sixty days of August 19, 1980, the defendant shall purchase the plaintiff's interest in said premises, which interest shall be established as one half of the said appraised value, deducting therefrom the balance on the mortgage. Simultaneously with the payment of the said one half of the equity to the plaintiff, she shall execute a deed prepared by the defendant for her signature, conveying all of her interest in said property to the said defendant. The condition of this conveyance, however, shall be the continued occupation of the said by the defendant and the infant children solely, or with defendant's wife should he remarry, until the last child graduates from high school, this condition being

the basis on which this arrangement and custody have been made between plaintiff and defendant.

5. The plaintiff shall have the right to occupy the premises, together with the defendant and the infant children, for a period of ninety days from August 19, 1980, at which time she shall remove herself from said premises.

6. The plaintiff shall be the owner of the following items of furniture and/or furnishings in the marital home, or wherever they are located, having been removed from the said home:

Luggage
China
Kitchen utensils
Antique ice box
Clock
Rocker
Three pictures
Two lamps
Two black vases
Bed room set
High rise bed
Floor cushions
Stereo speakers
Her sewing machine, clothing, & hook rugs

Boy's wooden blocks and wooden puzzles

All other contents of the said residence shall be the property of the defendant, except that the seesaw which came from the plaintiff's family, shall be used by the children, but may not be sold, and shall be, when the children no longer use them, turned over to the plaintiff's sister, and shall not be the property of the defendant.

7. The defendant shall provide and there shall be nursery school available to Michael Mastropietro for an additional year and to Jeffrey Mastropietro for two years.

8. The defendant shall turn over to the plaintiff the plaintiff's father's antique gun, which shall be the property of the plaintiff.

9. Approximately $800 have been removed by the defendant from the children's bank accounts. The said sums in the

denomination in which they were removed shall be the property of the said children, to be given to them at the time of their majority. The said deposits shall be made forthwith.

10. Plaintiff and defendant shall each be responsible for the debts which they will incur from August 19, 1980, on. The defendant shall be responsible and shall pay all household debts which have been incurred by plaintiff and defendant singly or jointly, up to and including August 19, 1980 and he shall hold the plaintiff harmless from any responsibility for the payment of said debts.

11. The plaintiff and defendant shall each continue to be the owner of the automobile presently in their name and in their respective possession.

12. By way of distribution, the defendant shall pay the plaintiff the sum of

$2,200, which represents one-half of two bank accounts and shall pay to plaintiff the sum of $493.70 representing one-half of the 1979 I.R.S. tax rebate check.

The parties having referred to the Court the determination of counsel fees for their attorneys and repayment of a loan from defendant's parents, it is hereby ORDERED:

13. There is due and owing to defendant's parents the sum of $8,300 loaned to the plaintiff and the defendant on the purchase of the marital home. There shall be deducted from the top of the equities for the marital home above set forth, the said sum of $8,300, in addition to the mortgage, before distribution is made of said equity.

14. Defendant shall pay to Sachar, Berstein, Rothberg, Sikora & Mongello, Esqs., attorneys for the plaintiff, on account of their counsel fee, the sum of

$1,000.

MICHAEL R. IMBRIANI
J.S.C.

I, W.Lewis Bambrick, Clerk of the Superior Court of New Jersey, the same being a Court of Record, do hereby certify that the foregoing is a true copy of the Final Judgment now on the files of my office

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Trenton, this 17th day of September, Nineteen hundred and eighty

545

This Deed, made the 14th day of January 1981, between Maxine L. Mastropietro, single, c/o CMDNJ (Adolescent Unit), University Heights, Hoes Lane, in the Township of Piscataway in the County of Middlesex and State of New Jersey herein designated as the grantors; and Robert A. Mastropietro, single, residing or located at #71 Highland Avenue, in the Township of Bridgewater in the County of Somerset and the State of New Jersey herein

designated as the Grantees;

Witnesseth, that the Grantors, for and in consideration of six thousand two hundred and twenty-two dollars and 81/100 ($6,222.81) lawful money of the United States of America, to the Grantors in hand well and truly paid by the Grantees, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledge, and the Grantors being therewith fully satisfied, do by these presents grant, bargain, sell and convey unto the Grantees forever, all that tract or parcel of land and premises, situate, lying and being in the Township of Bridgewater in the County of Somerset and the State of New Jersey, more particularly described herein. (NJS46:15-2.1)Municipality of Bridgewater Township Block No. 4508, Lot No. 27 and 28, beginning at a point for a corner formed by the intersection of the

northerly side line of Highland Avenue and the easterly side line of Maple Avenue; thence (1) along the easterly side line of Maple Avenue running north 1 degree 46 minutes east 200.67 feet to a corner; thence (2) running north 87 degrees 5 minutes east 114.96 feet to a corner; thence (3) running South 2 degrees 55 minutes east 200.00 feet to a corner on the aforementioned northerly side line of Highland Avenue; thence (4) along the northerly side line of Highland Avenue running South 87 degrees 05 minutes west 131.34 feet to the point and place of BEGINNING.

THE ABOVE described premises being lots #27 and #28 in Block G as shown on a map entitled "Map of First Section of Green Knoll Park, Somerville, Bridgewater Township, Somerset County, N.J., April 1, 1910" which map was filed in the Somerset County Clerk's Office on June 8, 1910 as

Map #104-A

BEING commonly known and designated as 71 Highland Avenue, Bridgewater, New Jersey.

BEING the same premises conveyed to ROBERT A.MASTROPIETRO AND MAXINE L. MASTROPIETRO, his wife, by deed from JOHN S. VASTA AND CONCETTA J. VASTA his wife, dated March 10th, 1977, and recorded on March 17th, 1977 in the Office of the Clerk of Somerset County, in Book 1348, page 43.

The Grantor and Grantee herein were divorce by Dual Final Judgment of Divorce entered in the Superior Court of New Jersey, Chancery Division, Somerset County, Docket No. M-8660-79, dated September 11th, 1980.

A provision of the Dual Fianl Judgment of Divorce, specifically paragraph 4 therein, sets forth a condition of the within conveyance as follows:

"4...The condition of the conveyance,

however, shall be the continued occupation of said by defendant and the infant children solely, or with the defendant's wife should he remarry, until the last child graduates from high school..." Together with all and singular the buildings, improvements, ways, woods, waters, watercourses, rights, liberties, privileges, hereditaments and appurtenances to the same belonging or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and of every part and parcel thereof; And also all the estate, right, title, interest, use, possession, property, claim and demand whatsoever, of the Grantors both in law and in equity, of, in and to the premises herein described, and every part and parcel thereof, with the appurtances. To have and to hold all and singular, the premises herein described, together with the appurtenances, unto the grantees and to Grantees' proper use and benefit

forever.

And the Grantors covenant that they have not done or executed, or knowingly suffered to be done or executed, any act, deed or thing whatsoever whereby or by means whereof the premises conveyed herein, or any part thereof, now are or at any time hereafter, will or may be charged or encumbered in any manner or way whatsoever.

In all references herein to any parties, persons, entitles or corporations, the use of any particular gender or the plural or singular number is intended to include the appropriate gender or number as the text of the within instrument may require. wherever in this instrument any party shall be designated or referred to by name or general reference, such designation is intended to and shall have the same effect as if the words "heirs,

executors, administrators, personal or legal representatives, successors and assigns" had been inserted after each and every such designation.

In Witness Thereof, the Grantors have hereunto set their hands and seals the day and year first above written.

Signed, Sealed and Delivered
in the presence of
Francis T. Gleason, Jr. Maxine L. Mastropietro
Jan 14, 3:24 pm 1981
Somerset County
L.R.Olson, Clerk

State of New Jersey, County of Somerset: be it remembered that on January 14th, 1981, before me, the subscriber, personally appeared Maxine L. Mastropietro, single, who I am satisfied is the person named in and who executed the within Instrument, and thereupon she acknowledged that she signed, sealed and delivered the same as her act and deed, for the uses and purposes therein expressed, and that the full and actual consideration paid or to be paid for the transfer of title to realty evidenced by the within deed, as such consideration is defined in P.L. 1969,c.49,Sec.1(c), is $6,222.81.

Francis T. Gleason, Jr
An attorney at law of
New Jersey

prepared by:
Leroy P. Lusardi, Esq.

BOOK 1434page519 END OF DOCUMENT

CERTIFICATION OF DEFENDANT

I, ROBERT ALAN MASTROPIETRO, do hereby certify the following:

1. I am the defendant in the within cause of action and I am familiar with the facts stated herein.

2. On September 11th, 1980 a Dual Fianl Judgment of Divorce was entered in this matter, a copy of which is annexed hereto and marked Scedule A.

3. I make this application to the Court for an Order to amend said Dual Judgment of Divorce, specifically paragraph 4 dealing with a sale restriction and paragraph 2 dealing with visitaion.

4. Pursuant to the Judgment of Divorce I was awarded custody of the three sons of the marriage, Brian, Michael and Jeffrey. My sons continue to reside with

me. Since the entry thereof I have remarried, having married Oksana Jasinousky on April 2nd, 1982. We now have one son born of the marriage, being Kevin, who was born on June 10th, 1983, and is now 2 years of age.

5. Our present home consists of a 3 bedroom house having about 1,000 square feet of living area, and with my present family of a wife and 4 sons the house is just not large enough for us. The children are now aged 10, 9, 7, and 2 and they require more adequate sleeping arrangements than presently exist. We now have two children occupying bunk beds in a room that is only 12.4 x 8.5 feet. I would like to sell the property at 71 Highland Avenue, Bridgewater, New Jersey, and purchase a larger home for the family. In view of the high cost of housing in Bridgewater, I would request that I be permitted to purchase property

within a 25 mile radius of Bridgewater so that my former wide will not be unreasonably inconvenienced in visiting the children, and ask that this Court modify the Dual Judgment of Final Divorce to remove the restriction against the sale of the Highland Avenue property and permitting me to purchase larger accomodations as indicated above. I am willing to have a similar restriction against sale placed against the property which I do purchase, if necessary.

6. In April of 1985 I discussed this matter with the plaintiff and initially she agreed to such a revision in regard to a move within Bridgewater. My attorney prepared the appropriate documents which I submitted to plaintiff for her signature on or about May 23rd, 1985. Those documents consisted of an Order to Amend Dual Final Judgment of Divorce and proposed Quit Claim Deed. They are

annexed hereto as Scedules B and C.

7. The plaintiff thereupon indicated that she had changed her mind and refused to sign the documents. She never objected to the form of the document.

8. I would also ask that the visitation priveleges as contained in paragraph 2 of the Dual Judgment of Final Divorce be revised, wherein my former wife was granted "unlimited" visitation with the children. That may have been a reasonable provision at the time that the divorce was granted in view of the tender ages of the children of the marriage at such time. Now that the boys are older, this unlimited visitation is becoming a hardship on both the boys and me. My former wife has been taking the children three and four nights during the week and two out of three weekends. This conflicts not only the personal lives and schoolwork of the children, but with

other family activities which we may have planned. The only nights she does not take the children is when they have soccer or little league baseball. Therefore I find myself with almost no free time to spend with them doing our family activities or father-son type activities, such as fishing and sports. The boys presently exist almost "out of suitcase" which is very difficult for them and for me. I find it much more difficult to schedule any activities with my boys, since I constantly feel that any resistance would create conflict, and I don't feel that is a good situation psychologically for the children. I have had numerous discussions with the plaintiff aobut the visitation but she has refused to agree to any form of limitation on the visitation. I would ask that the Court place a limitation on visitation to every other weekend and one

weeknight per week.

9. It should also be pointed out that the plaintiff has not been abiding by the 48 hour notice requirement of the present Order and her apparent interpretation of unlimited visitation means that she can visit when she pleases without notice. It is totally unworkable. The plaintiff insists upon keeping the boys overnight on school nights, which interferes with their homework assignments and necessary adjustments to prepare for school days. For instance, on Wednesday, June 12th, 1985, the plaintiff insisted upon picking up the boys for Wednesday and Thursday overnight and to take them out of school on Friday, June 14th, 1985 to go to Great Adventure. She had given 48 hours notice of this visitation but I tried to talk her out of the overnight and the length of the visitation. She refused to listen. On Friday, June 14th, she called to say

that she wasn't bringing the boys back that night, although she had originally promised that she would. I discussed with her the fact that the boys participated in an early Saturday, June 15th, 1985 am soccer match. Her answer was "you pick them up at 6:30 in the morning and take them to soccer, as you please."

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

DATED: June 19th, 1985.
ROBERT ALAN MASTROPIETRO, DEFENDANT

END OF DOCUMENT
lil

MAXINE L. MASTROPIETRO
30 Fairmount Avenue
Bridgewater, NJ08807
(201)722-4792
Plaintiff

SUPERIOR COURT
CHANCERY DIV
FAMILY PART
SOMERSET COUNTY

Plaintiff,
MAXINE L. MASTROPIETRO

DOCKET NO
M-8660-79

vs

Defendant,
ROBERT A. MASTROPIETRO

CIVIL ACTION

CERTIFICATION OF PLAINTIFF IN OPPOSITION TO MOTION TO MODIFY FINAL JUDGMENT OF DIVORCE

I, Maxine L. Mastropietro do hereby certify the following in opposition to defendant's motion to modify Dual Fianl Judgment of Divorce:

(1) I am the plaintiff in the above entitled matter and make this certification in response to defendant's motion returnable July 12, 1985.

(2) The parties entered into a property settlement agreement dated Sept 11, 1980 which became part of Dual Final Judgment of Divorce as attached to Certification of Defendant (Schedule A)

(3) I was a hardfought agreement. Issues concerning house and visistation schedule were essential elements of entire

agreement. In fact, it was so essential that the provision concerning limit of sale of house was recorded on the deed; the only reasons I gave up custody. Because of defendant's attitude at time of divorce I felt these provisions would be the Only way I could secure what was best for our children. Both natural parents would have input into the upbringing of the children.

(4) It is my understanding that law requires a substantial change in circumstances to amend or change an agreement that was entered into by consent. In my opinion he has not demonstated a substantial change of circumstances that could not have been contemplated at time we entered into agreement. In fact, the agreement refers to circumstances of his remarriage.

(5) I resided at said residence four years and to the best of my knowledge

circumstances of living arrangements are not unreasonable or uncomfortable. I regularly visit with my children and they have never complained about living arrangements. If defendant feels circumstances are so unbearable in my opinion he should look into expanding present residence instead of immediately coming to court to change original agreement.

(6) If he moves outside of Bridgewater it would not be in best interests of children because it would change their school, change their friends, and be further away from me. Over last year children have finally settled in school, like friends, and are involved in extracurricular activities through school system. A change would mean starting all over again and they have had enough upheaval in their lives.

(7) As an example, in November, 1983,

Brian had been having significant difficulty to warrant an evaluation by the Child Study Team. At present, June, 1985, he has fianlly tested out of Basic Skills Program.

(8) Since date of divorce I have worked two, sometimes three jobs to buy a house close to my children. It is interesting that I have finally achieved five-year goal of house near children and that he has been living under these alleged unbearable conditions for two years and chooses to make this application within a few months of achieving goal.

(9) Defendant distorts problems with visitation. He attempts to give impression that he does all transporting for visitation and extracurricular activites. This is absolutely untrue. I do entire driving for visitation and when children have activities I transport for activities.

(10) Present distance is three miles between houses. I pick up and return children which is twelve miles. In addition, I take them to their activities which may be as far away as seven miles and return to my residence and later pick them up again and return to my residence. As an example one weekend (Fri 2:40p-Sat, 7:30p) resulted in 97 miles of traveling for children. If he were allowed to move this traveling distance would increase dramatically.

(11) In regard to defendant's application to limit visitation, the provision of property settlement agreement providing for unlimited visitation was the essential consideration for allowing him to have custody. That his allegations that it creates problems are untrue. That I am always flexible if defendant plans activities with children.

(12) His application for specific visitation is unacceptable and unworkable for me because of my employment requiring I work every third weekend. Most importantly the flexibility of present situation meets the children's needs and allows them maximum contact with both parents. If defendant truly desires to spend more time with the children I am more than willing to discuss with him ways to accomplish that. If the court believes nothing else in this certification, it is essential the court believe I have only the children's best interests in mind.

(13) Based upon above I respectfully request the court deny the defendant's application in its entirity. If the court feels there is some merit to defendant's application, that I respectfully request a hearing on all issues.

MAXINE L. MASTROPIETRO, PLAINTIFF

I certify that the original of the within Certification of Plaintiff in Opposition to Defendant's Motion to Modify Dual Final Judgment of Divorce has been forwarded to the Clerk of the Superior Court at Trenton for filing; a copy has been forwarded to the Clerk of Somerset County at Somerville for filing; and a copy has been forwarded to the attorney for defendant, Leroy F. Lusardi by certified mail.

DATED: July 5, 1985

MAXINE L.MASTROPIETRO

END OF DOCUMENT

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: SOMERSET COUNTY
DOCKET NO. M-8660-79

MAXINE L. MASTROPIETRO,
plaintiff

v.

ROBERT A. MASTROPIETRO,
defendant

Stenographic Transcript of Motion

Place: Somerset County Courthouse
Somerville, NJ 08876

Date: July 12, 1985

B E F O R E
THE HONORABLE MICHAEL R. IMBRIANI, JSC

TRANSCRIPT ORDERED BY: Maxine L. Mastropietro

A P P E A R A N C E S:

Maxine L. Mastropietro, Pro se

more about that move, or can I get into the history?

THE COURT: Let's get into this. Not too much history.

M. MASTROPIETRO: I don't want to get into too much history either because it's pretty sickening to me.

THE COURT: Why do you object to any move at this time even across the street? Why should I require them to stay in this house and put an addition on, which is very expensive this day and age, and not be able to move anywhere?

M.MASTROPIETRO: It's substantially less expensive tham moving, period. It could cost him $5,000 to raise a roof and

put three bedrooms and a bath, maintain the same neighborhood--

THE COURT: $5,000?

M. MASTROPIETRO: A neighborhood we agree on to raise our children in. Okay? We both agreed that we liked that neighborhood to raise our children in.

If you now allow him to move, to choose a neighborhood where they can further slander me, where none of the parents

... page 10

THE COURT: Three miles one way?

M. MASTRPIETRO: And I just moved to decrease the mileage from seven to that.

THE COURT: I mean suppose, for instance, they wanted to move to Thomae Park, which is the other side of Bound Brook, which is about two--it's close to where you now live. Would you object?

M.MASTROPIETRO: Yes. You are not maintaining a neighborhood--we both

agreed on this neighborhood for the quality of the neighbors, the friendliness of it.

My children get more nurturing from that neighborhood than they do from the defendant, and you're allowing he can now move and he can choose a neighborhood where they can further damage the children and their self esteem.

THE COURT: What proof is there that they'd be damaged by a move? I don't see--there is nothing to tell me--

M.MASTROPIETRO: You don't think that--

THE COURT: I mean moving today is a

normal thing . Tens of thousands of children move. They don't become damaged over that.

M.MASTROPIETRO: No, they don't become damaged from moving from one building to another, but this building secures a lot more than that. It has secured their

friends, which are most important to the children.

The children don't want to move. They want to maintain those friends. Two of the three children want to maintain their friends in that neighborhood.

The children don't care that the defendant moves, as long as they can stay in the neighborhood.

Are they really wanting to move, after six months ago thay went to such an extent to prevent me from moving there? If they wanted to move, why didn't let me move there and then move out?

THE COURT: I don't think they had that much to say six months ago, very candidly.

Suppose he got another job, what would happen?

M.MASTROPIETRO: What do you mean another job? Requiring he move out of state?

THE COURT: A job down in Atlantic City.

M.MASTROPIETRO: That's just it. That agreement is a specific agreement. It did not leave it to general law precedent that he could move within the state. It was a specific agreement that he remain at that said residence. It's an agreement that says on the deed--that further states that was the sole basis for the entire agreement, and it's a specific one. It's not leaving it up to--it didn't say he could move within Bridgewater. It didn't say he could move within the State. It said he was to stay at that residence, and you are allowing a change in this agreement at this point and it is going to snowball into an entire deterioration.

I put up with harrassment over visitation, clothing, medication--

THE COURT: That has nothing to do with

whether he lives here or any where else. Those problems are going to exist.

Is there any detriment to you if he were permitted to move? Forget the children at this point. If he were permitted to move into

...page 14

M.MASTROPIETRO: It would be a lot better than moving further than three miles.

THE COURT: Well, I just asked you about Thomae Park. That's closer to your home.

M.MASTROPIETRO: I would prefer a move closer than a move further away, but it doesn't secure what this agreement already secures, their friends in that neighborhood and the type of neighborhood that they are living in and a neighborhood that is secure that they can't slander me in.

THE COURT: I don't think that has

anything to do with--

M.MASTROPIETRO: Until the people move out of it, and the people heve lived there a long time.

THE COURT: Anything more you want to add, ma'am.

M.MASTROPIETRO: Yes.

THE COURT: Go ahead

M.MASTROPIETRO: I want to add that you are changing one-sided a consent agreement in favor of the defendant, and five years ago that was a hard-fought agreement. Okay? I was under extreme duress of providing everything for the children a year prior to the divorce. The defendant deserted. He had plans to desert after the divorce, to take a job in Europe. I did not have a salary to provide for my children. It left me with a job of living on welfare or working two jobs, which would not have left me time to see my children at all, and on top of

that, I had difficulty with billing over an attorney not knowing where money was being spent there. I had difficulty--I came into Court paying thousands of dollars that would take me months to earn where I had to sit in Court all day and not be heard!

At that time I secured all I could for the children. Same parents, regular frequent contact with both parents, same friends, same house, same neighborhood, same schools, the same standard of living, and that is what that physical building is securing.

I sacrificed my primary life goal of being mother, the daily nurturing of my children, and I have lost that for five years of my life, and they've lost on that because they had to adjust to the drastic life style of parenting between defendant and

...page 25

in the wings, and you don't sign the deed.

M.MASTROPIETRO: Look, I am the one that doesn't spend money because I want to spend it on my children. I am not going to pay moneys for attorneys. How many thousands of dollars, how many days of overtime--I'll have to work 50 days of overtime for an appeal.

THE COURT: Mrs. Mastropietro, are you telling me now that you will accept the decision that I've just rendered and then when a new house is found by Mr. Mastropietro that you will sign the deed to sell the old property as long as you see in the new deed a statement similar to this deed?

M.MASTROPIETRO: The order is he has to move within three miles of my present residence?

THE COURT: Yes

MR.LUSARDI: Judge, I prepared the deed

because she had agreed once before in April--

M.MASTROPIETRO: I did not agree. He lied about that.

MR.LUSARDI: And she didn't sign then.

THE COURT: I am going to trust her.

...page 26

END OF DOCUMENT

FILED
Jul 15 2:06 pm'85
SOMERSET COUNTY
L.R.OLSON CLERK

LEROY P.LUSARDI,ESQ
265 East Main St
Somerville, NJ 08876
(201)725-8200
Attorney for Defendant

SUPERIOR COURT
OF NEW JERSEY
CHANCERY DIV
FAMILY PART
SOMERSET COUNT

Plaintiff,
MAXINE L.MASTROPIETRO
V
Defendant,
ROBERT A.MASTROPIETRO

DOCKET NO
M-8660-79

CIVIL ACTION

ORDER AMENDING
DUAL FINAL
JUDGMENT OF

DIVORCE

This matter being opened to the Court by Leroy P. Lusardi, Esq, attorney for defendant, on application for a Order to amend the Dual Final Judgment of Divorce in this matter, and the Court having considered the moving papers and being of the opinion that this Order should be made,

IT IS, on this 15th day of July 1985,

ORDERED that the Dual Fianl Judgment of Divorce entered in this matter on September 11th, 1980, be and the same is hereby amended as follows:

(1) Paragraph 2 thereof shall be amended so that the plaintiff shall have the right of visitation with the infant children born of the marriage on alternate weekends between the hours of 5:00 PM on Friday and 6:00 PM on Sunday, and on one night during the week between

the hours of 5:00 PM and 10:00 PM, upon giving the defendant express 48 hour notice of her intentions. Plaintiff shall also have the right of visitation on alternate holidays. The parties shall alternate Thanksgiving, New Year's Day, Easter, Memorial Day, 4th of July and Labor Day. The children's birthdays and Christmas shall be shared by both parents. Each year the parents shall alternate Christmas Eve and Christmas morning with Christmas afternoon including Christmas dinner. Plaintiff shall also be entitled to two weeks of summer vacation with all of the children simultaneously, provided she gives 30 days notice thereof to defendant.

(2) Paragraph 4 shall be amended by deleting therefrom the restriction against defendant's removal from the marital premises until the last child graduates from high school. The plaintiff

shall execute a Quit Claim Deed relinquishing said restriction as recorded in deed book 1434 at page 518, Somerset County Clerk's Office ~~within 30 days from the date hereof~~ AT THE TIME of closing. Until the last child shall graduate from high school the defendant shall not reside outside the radius of ~~25~~ 3 miles ~~of~~ from THE PLAINTIFF'S home IN Bridgewater Township, Somerset County, New Jersey.

MICHAEL R.IMBRIANI JSC

END OF DOCUMENT

MAXINE L. MASTROPIETRO
30 Fairmount Avenue
Bridgewater,NJ08807
(201)722-4792
Plaintiff

SUPERIOR COURT
OF NEW JERSEY
CHANCERY DIV
FAMILY PART
SOMERST CTY

Plaintiff,
MAXINE L.MASTROPIETRO
vs
Defendant,
ROBERT A.MASTROPIETRO

DOCKET NO
M-8660-79

CIVIL ACTION

CERTIFICATION
OF PLAINTIFF
IN OPPOSITION

TO DEFENDANT'S
MOTION TO
RECONSIDER
COURT ORDER OF
JULY 15TH,1985

I, MAXINE L.MASTROPIETRO, do hereby certify the following in opposition to defendant's notice of motion to reconsider court order of July 15, 1985:

1) I am the plaintiff in the above entitled matter and make this certification in response to defendant's motion returnable August 2, 1985.

2) I am shocked by this re-application. That I was served by these papers at 7pm Monday, July 22, 1985 and have been advised by the court clerk that the motion will be heard August 2, That based upon this application I have been forced to try and obtain legal counsel and am unable to do so on such short notice.

3) I did get an appointment with an

attorney who would not take the case but who advised me of the following legal ramifications of this motion:

a) that I must have two weeks notice for a motion

b) that this application would fall under rule 4:50-1, which specifies certain circumstances which would allow relief from an order.

4) In regards to paragraph 3b in my certification, the attorney I met with advised me that based upon all documents submitted in this motion, there is nothing which would allow the defendant to make this application based on rule 4:50-1. Such as the defendant filed his motion and I was served on June 20. I responded in a timely manner and that even if the defendant's attorney did not receive my response on time, he did not make any objection at the time of the hearing.

5) The reason defendant is requesting this re-consideration seems to be that I stated the present traveling distance was 2 1/2 miles and that Mr. Lusardi did not have the defendant in court to challenge that allegation. This is untrue. Paragraph 10 of my certification said present distance is three miles. If defendant wanted to contest this allegation there is no reason why he couldn't have supplied the court with the information set forth prior to July 12 or request an adjournment in order to supply the court with this "new information". It appears to me that the defendant simply did not like the court's decision and is now attempting to have the court re-consider the entire matter. The proper course would be for the defendant to appeal this court's decision.

6) In regards to papers filed on behalf of defendant for this motion, I

would like to point out that the defendant is a chemical engineer and is not qualified to accurately depict the distances in the school districts.

7) Defendant apparantly attempts to dispute my allegation as to the present distance from our residences by saying it is 4.1 miles rather than my allegation that it was approximately 3 miles; however, he admits that it is 3.4 miles "as the crow flies" and is apparantly trying to extend the limitation to 6 miles "as the crow flies". Obviously, the attached map does not take into consideration actual travel distance.

8) The defendant also attempts to mislead the court by stating that my only objection to his move would be the change of schools for the children. This is untrue. My certification dated July 5, 1985 sets forth numerous other reasons.

9) In an attempt to be reasonable I

did actually measure the driving distance between our present residences and found it to be 4.1 miles. As I stated to Judge Imbriani's law clerk, I have no objection to the order being modified to the extent that the defendant may move within a radius of 4.1 miles driving distance from the plaintiff's present home in Somerset County.

10) In the event the court decides to change the present order other than modifying to the extent of the 4.1 mile radius, I respectfully request that the court allow me sufficient time to obtain legal counsel in order that I may be properly represented. I have contacted five attorneys to represent me in this matter but have only been able to meet with one due to short notice and vacations.

11) In regards to the order signed on July 15, 1985. I received my copy on July

17 and telephone Judge Imbriani's law clerk to inquire as to why the order did not specify that any new residence's deed purchased by the defendant would contain the same restrictive covenant as contained in the present deed. He advised me that he recalled that this was part of Judge Imbriani's decision. Accordingly, I respectfully request that this specific language be included in the court's next order.

12) Based upon the defendant's actions and dissatisfaction with the court's prior order, I have had to spend $100.00 for consultation with an attorney. I respectfully request that the defendant be required to reimburse me for this expense.

MAXINE L.MASTROPIETRO,

PLAINTIFF

I certify that the original of the

within Certification of Plaintiff in Opposition to defendant's Notice of Motion to Reconsider Court Order of July 15, 1985 has been forwarded to the Clerk of the Superior Court at Trenton for filing; a copy has been given to the Clerk of Somerset County at Somerville for filing; and a copy has been forwarded to the attorney for the defendant, Leroy P. Lusardi by certified mail.

DATED: July 26, 1985

MAXINE L.MASTROPIETRO,
PLAINTIFF

END OF DOCUMENT

SUPERIOR COURT OF NEW JERSEY FAMILY PART:
SOMERSET COUNTY DOCKET NO M-8660-79

MAXINE L. MASTROPIETRO
Plaintiff
v.
ROBERT A.MASTROPIETRO
Defendant

STENOGRAPHIC TRANSCRIPT OF EXCERPT OF PROCEEDINGS

PLACE:
Somerset County Court
Somerville, NJ

DATE:
August 2, 1985

BEFORE: THE HONORABLE MICHAEL R.IMBRIANI JSC

TRANSCRIPT ORDERED BY:
Maxine L. Mastropietro

A P P E A R A N C E S:

MAXINE L. MASTROPIETRO
Plaintiff Pro Se

LEROY P. LUSARDI, ESQ.
Attorney for the Defendant

CHARLES R. SENDERS, CSR
OFFICIAL COURT REPORTER
SOMERSET COUNTY COURTHOUSE
SOMERVILLE, NEW JERSEY 08876

THE COURT: Before we get into the criminal list, we have a motion carried over from July 12.

This is Mastropietro versus Mastropietro. This is a case involving a matrimonial dispute in which I entered an order on July 12.

It was somewhat unique in that the judgment of divorce provided that the Defendant-father, who had custody of the children, would not sell his home and would always reside in the same home.

He is now seeking permission, because he has remarried and has additional chid,

to sell the home, in contravention of the express terms and conditions in the judgment of divorce.

The reason, as he says, is that he needed additional space and the original family home is too small.

The wife objected because she felt it was important to her and the children that they remain in the neighborhood, which is why she insisted on that provision in the judgment.

What I did on July 12 was enter an order which provided that Mr. Mastropietro could sell the home. But that any new home that he purchased could not be further in distance from the home in which the Plaintiff-mother resided.

In other words, I felt that if it was necessary, in the opinion of Mr. Mastropietro to sell the home, that home, that I would permit him to do so. But I

don't think it is fair to have the children moved very far.

I didn't think it was fair for the plaintiff-mother, who has visitation, to have to travel a greater distance. It was represented to me at that hearing by Mrs. Mastropietro, as I recall, that she resided three miles from the present family home.

Therefore, my order provided that Mr. Mastropietro could sell the family home. But the new home that he purchased would have to be within a radius of three miles of the home that Mrs. Mastropietro now resides.

I now have a motion for reconsideration. One of the things pointed out in the affidavit, and I don't think there is any dispute, is that Mr. Mastropietro actually measured the distance from his home to Mrs.

Mastropietro's home, which he figured out by air miles he said is 3.4 miles. I don't know how he did that, but that's what he says. The shortest distance by car, according to Mr. Mastropietro, is 4.1 miles

He is now back asking for permission, I assume, to purchase a home that is more than three miles from the home of Mrs. Mastropietro. He is asking for permission to purchase a home within the radius which is much greater in mileage than I am now permitting, from Mrs. Mastropietro's home.

So, I have received the motion, I have reviewed it. I have examined the certification of Mr. Lusardi, his attorney, who submitted the motion. There is a certification by Mrs. Mastropietro in opposition.

Alright.

MR.LUSARDI: if it please the Court, at

the outset I'd like to thank the Court for giving us the time for you to hear the reconsideration of this motion at an early date, considering your Honor's vacation schedule.

With regard to the parents, the Defendant who I represent and the Plaintiff, their ideas about what should happen with the children.

page 5...16

END OF DOCUMENT

FILED
Aug 9 3:26 PM'85
SOMERSET COUNTY
L.R.OLSON CLERK

LEROY P.LUSARDI,ESQ
265 E. Main Street
Somerville, NJ08876
(201)725-8200

SUPERIOR COURT
OF NEW JERSEY
CHANCERY DIV
FAMILY PART
SOMERSET COUNTY

Plaintiff
MAXINE L.MASTROIETRO

vs

Defendant

DOCKET NO
M-8660-79

CIVIL ACTION

ROBERT A.MASTROPIETRO

ORDER

This matter being opened to the Court by Leroy P. Lusardi, Esquire, attorney for defendant,and Maxine L. Mastropietro, plainttiff, appearing pro se, on application to reconsider an Order entered on July 15th, 1985 and to grant further relief to amend the Dual Fianl Judgment of Divorce; and the Court having considered the certifications on behalf of the parties and the argument of counsel and plaintiff, pro se;

IT IS, on this 9th day of August, 1985,

ORDERED that the relief requested by defendant is denied, except that, to conform the July 15th, 1985 Order to corrective mileage information furnished by the certifications on behalf of the parties, it is ORDERED that paragraph 4

of the Dual Final Judgment of Divorce entered September 11th, 1980 shall be amended by deleting therefrom the restriction against defendant's sale and removal from the marital premises until the last child graduates from high school. The plaintiff shall execute a Quit Claim Deed releasing said restriction as recorded in deed book 1434, page 518, Somerset County Clerk's Office, at the time of closing. Until the last child shall graduate from high school, the defendant shall not reside outside a 3.4 mile radius (by air) or 4.1 mile road mileage from plaintiff's home in Bridgewater Township, Somerset County, New Jersey; and it is further

ORDERED that a similar restriction be placed upon the deed to be received by defendant, Robert Alan Mastropietro, in connection with the purchase of an alternate residence.

MICHAEL R.IMBRIANI JSC

END OF DOCUMENT

SUPERIOR COURT OF NEW JERSEY
Michael R. Imbriani, Judge
Somerset County Court House
P.O. Box 3000
Somerville, New Jersey 08876
(201)231-7075

September 6, 1985

LeRoy P. Lusardi, Esq.
265 East Main Street
Somerville, New Jersey 08876

re: Mastropietro v Mastropietro
Docket No. M-8660-79

Dear Mr. Lusardi:

I just returned from vacation and read Mrs. Mastropietro's letter to me of August 8, a copy of which was sent to you.

She makes reference to a hearing which was held on August 2 (which was my last

day at work before leaving on vacation). Apparantly you have submitted a proposed order under the five day rule, but very frankly, I have no recollection of receiving the order or signing it. Perhaps I had before I went on vacation, but I certainly cannot recall signing it.

In any event, please review this matter and advise me whether the order is signed and what your position is with respect to the argument of Mrs. Mastropietro as to what should be the content of the order.

Very truly yours,

MICHAEL R.IMBRIANI

jm

cc:Mrs. Maxine L. Mastropietro

END OF DOCUMENT

SUPERIOR COURT OF NEW JERSEY
Michael R. Imbriani, Judge
Somerset County Court House

P.O.Box 3000
Somerville, New Jersey 08876
(201)231-7075

September 17, 1985

Leroy P. Lusardi, Esq.
265 East Main Street
Somerville, New Jersey 08876

re: Mastropietro v. Mastropietro
Docket No. M-8669-79

Dear Mr. Lusardi:

This is to acknowledge receipt of your letter dated September 16 which was hand delivered to my Chambers yesterday.

I agree with you that since Mrs. Mastropietro has filed a Notice of Appeal that it would be improper for this Court to amend its prior order.

It is my understanding that an appeal removes the matter from the jurisdiction of the trial court and any changes and additions shoud be made by the Appellate Division.

Very truly yours,

MICHAEL R.IMBRIANI JSC

a60

jm
cc: Ms. Maxine L. Mastropietro

END OF DOCUMENT

CERTIFICATION OF PLAINTIFF

I, Maxine L. Mastropietro, do hereby certify the following:

1. I am the plaintiff in the within cause of action and I am familiar with the facts stated herein.

2. Following the defendant's Motion for Reconsideration returnable August 2, 1985, the defendant's attorney, Mr. Lusardi, submitted a proposed Order according to the "five day rule"; I received the proposed Order on August 7,1985 and submitted timely objections to the wording of this Order. I then received a copy of the proposed order signed by the Honorable Michael R. Imbriani as entered in the above matter on August 9, 1985, without reference to my objections.

3. On September 6, 1985, I filed a Notice of Appeal with the Appellate Division of the Superior Court. It is annexed hereto as Schedule A.

4. On September 9, 1985 I received a copy of a letter sent to Mr. Lusardi, the defendant's attorney, from the Honorable Michael R. Imbriani inquiring as to the status of the Order. He states that his last day of work prior to vacation was August 2, 1985 and further states that he just returned from vacation and read the letter of objections. This letter annexed hereto as Schedule B.

5. On September 9, 1985, the defendant, Robert Alan Mastropietro, had a Century 21, Colonial Hills, realty sign displayed at the 71 Highland Avenue residence and apparantly has entered into a contract with said realty. Innocent parties could incur detriment from this action.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willingly false, I am subject to punishment.

Maxine L. Mastropietro
plaintiff pro se

DATED: September 17, 1985

END OF DOCUMENT

DANIEL MARTIN. ESQ
356-12 Gemini Drive
S. Somerville,NJ 08876
(201)874-4871
Attorney for
Plaintiff-appellant

SUPERIOR COURT
OF NEW JERSEY
APPELLATE DIV

DOCKET NO
A-220-85T6

MAXINE L.MASTROIETRO
Plaintiff-appellant

vs

ROBERT A.MASTROPIETRO
Defendant-respondent

CIVIL ACTION :
On Appeal From
Final Judgment
the Superior
Court of New
Jersy Chancery
Div, Fmy Part,
Somerset Cty:
Amending Final
Judgment.

SAT BELOW : Hon Michael R. Imbriani JSC

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT

On July 22, 1985, defendant filed a motion, returnable August 2,1985, seeking Reconsideration of the July 15, 1985 Order which forbade defendant from residing more than 3 miles from plaintiff's house until the last child graduated from high school. (Pa17-Pa18)

Oral argument was heard and an oral opinion delivered by Judge Imbriani on August 2, 1985. On August 6, 1985, Leroy P. Lusardi, Esq., attorney for defendant, submitted a proposed form of Order to Judge Imbriani. A copy was sent to plaintiff pursuant to the "5 day rule". R.4:42-1(b). (Pa19)

On August 8, 1985, plaintiff filed her objections to the proposed form of Order with Judge Imbriani, pursuant to R.4:42-1(b) (Pa20).

On August 9, 1985, an Order was signed by the Honorable Michael R. Imbriani, JSC, modifying the provisions of the July 15, 1985 Order. (Pa21-Pa22)

On September 6, 1985, plaintiff pro se filed a Notice of Appeal of the August 9, 1985 Order. (Pa23)

On September 6, 1985, Judge Imbriani wrote a letter to defendant's counsel. The Judge advised Mr. Lusardi that he did not recall signing the Order and that he had not read plaintiff's objections to the form of Order as required by R.4:42-1(b). The Judge asked Mr. Lusardi to respond to plaintiff's objections. (Pa24)

September 17, 1985, plaintiff filed a Notice of Motion, returnable October 4, 1985, seeking a clarification of the form of the August 9th Order in light of Judge Imbriani's letter, and a stay of the execution of that Order. (Pa25-Pa26)

Jersey. (Pa2-Pa3)

The preliminary Order signed by Judge Imbriani on July 15, 1985 (Pa15-Pa16) was signed contrary to the requirements of R.4:42-1. The form of the Order was not settled by Motion on notice to all parties, or upon consent of plaintiff under R.4:42-1(a); nor was a proposed form of Order submitted to plaintiff under the "5 day rule", R.4:42-1(b). (Pa33 at para 2)

On July 19, 1985, plaintiff called the Court to express her objections to the July 15th Order being signed contrary to R.4:42-1. She was told by Mr. O'Donnahue, Judge Imbriani's law clerk, not to be concerned with the form of that Order since a Motion for Reconsideration (Pa17, Pa18) had been filed by defendant and the July 15th Order, thus would not be the final order in the matter. (Pa33, para3)

The express condition of the agreement with respect to custody and to plaintiff's giving up her rights in the marital residence was that defendant would continue to reside in the marital residence until the youngest child graduated from high school. (pa3-23 and Pa4-1) The youngest child is currently 7 years old.

Plaintiff would not have agreed to defendant having custody of the children or to defendant retaining possession of the marital residence unless defendant agreed to continue to live there until the children were grown. (Pa35 at para 2, T12-4 to T17)*

On September 3, 1985, the marital residence was listed for sale by a multiple listing service. (Pa38)

...page 6

Quagliato v Bodner , 115 N.J. Super 133 (App Div 1971):

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*Transcript of July 12, 1985, to be known as T

> "...to obtain relief from an order under R.4:50-1(f), one must show that the enforcement of the order would be unjust, oppressive, or inequitable, Greenberg v Owens 31 NJ 402, 411 (1960) (Jacobs J. dissenting)"(Quagliato at 138); cf La Bell v Quasdorf , 116 NJL 368, 372 (Sup Ct 1936)

It has also been said that, "Relief may be granted under...subsection (f)...only where...there is also a showing of extreme hardship and the equities clearly run in favor of the party applying for relief from the judgment." Doyle v Chase Manhatten Bank 80 NJ Super 105, 125 (App Div 1963).

Defendant's application fell far short of establishing grounds for relief under either of these standards.

The one and only reason put forth by defendant to seek relief under R.4:50-1(f), is found at para 5 of defendant's Certification in Support of his Motion:

> "5. Our present home consists of a 3 bedroom house having about 1000 square feet of living area, and with my present family of a wife and 4 sons the house is just not large enough for us"(Pa111)

At oral argument on the Motion, defendant's counsel put forth no other justification for relief from the judgment besides the size of the house.

Thus, the question before the trial court was: would it be unjust, oppressive, or inequitable to enforce paragraph 4 of the divorce judgment, requiring defendant to remain in the marital home until the youngest child finishes high school (the youngest child

...page 9

to have been concerned with the best interests of defendant rather than those of the children:

> "I would also say, one of the reasons Mr. Mastropietro wants to move is because, as he indicates that the house

> is too small now for his needs and that Bridgewater is an area in which houses are very expensive.."(T4-21 to 25)

There is no doubt, however, that if defendant had made an adequate showing that the children would actually be harmed by enforcement of the judgment, as for example, if the house had been condemned as unfit for continued habitation due to unsanitary conditions, relief under R.4:50-1 would be appropriate.

However, no such showing was made, nor could it be made in light of the simple fact raised by plaintiff in her Cert fication in Opposition (Pa40, para 5), and her Certification attached to the Reply Brief (Pa33, para 4), that defendant could simply add on to the house at no greater cost to him than the costs of selling his current house and

buying a new house. (Brackett Construction Co. estimates, Pa42-45).

This solution would secure a larger living area for the children, while, at the same time, enforcing a judgment which should be enforced under the standards set forth by Quagliato v Bodner and Doyle v Chase Manhatten Bank , supra.

In Pogue v Pogue , 147 NJ Super 61, 64 (Ch 1977), the Court quoted the New York State Court of Appeals, with respect to a request for intervention in the best interests of the children:

> "'The court cannot regulate by its processes the internal affairs of the home. Dispute between parents when it does not involve anything immoral or harmful to the welfare of the child is beyond the reach of the law . The vast majority of matters concerning the upbringing of children must be left to the conscience, patience and self-restraint of father and mother. No end of difficulties would arise should judges try to tell parents how to bring up their children. Only when moral mental, and physical conditions

are so bad as seriously to affect the health or morals of the children should the courts be called upon to act . (2 N.E. 2d 661)'" (emphasis supplied)

The decision as to whether these children should live in the current residence, perhaps with additional space added on to it, or in a different residence, is not one which is appropriately made by the court. There is no evidence that moral, mental, or physical conditions seriously affecting the health or morals of the children would result from enforcing the voluntary agreement of the parties, entered into 5 years ago, providing that the children should continue to reside in the current residence.

Moreover, even if the question of where these children would be better off living is appropriate for judicial intervention, it was not adequately established that a move to another

residence would, in fact, serve the children's best interests.

In her Certification in Opposition (Pa40, para 6 & 7), at oral argument (T10-10 to 19, et. seq.), and again in her Certification in Support of Motion for Stay (Pa35, para 3), plaintiff explains her reasons why she feels that the proposed move would not serve the best interests of her children. Her principal reason is that the proposed move would disrupt the children's lives,

...page 12

alternative of adding on to the marital residence is available, the best interests of the children cannot serve as the basis for court intervention to set aside the agreement.

If the best interests of the children was, in fact, the basis for the trial

courts decision to amend the divorce judgment, then at the very least, the decision that the children's best interests would be served by a move should not have been made without affording plaintiff the opportunity to present evidence concerning those interests at a plenary hearing. This point will be developed at length in Point IV, infra.

Defendant will presumably argue in his brief in response, that regardless of how the Appellate Court might view the case, a motion under R.4:50-1 is addressed to the sound discretion of the trial court, guided by equitable principles, and the trial court's decision will be upheld in the absence of an abuse of discretion (cf Hodgson v Applegate 31 NJ 29, 37 (1959), Shammas v Shammas 9 NJ 321, 328 (1952), La bell v Quasdorf 116 NJL 368, 372 (Sup Ct 1936)).

However, as the La_bell Court pointed out:

> "This discretionary authority is legal and not_arbitrary in character; it must be exercised in_consonance_with established_principles_of_law ...JUDICIAL discretion , to borrow the words of Lord Mansfield, means 'sound discretion guided by law', and not by whim or humor."(La Bell at 372, emphasis supplied citations omitted)

Thus, in determining whether the trial court abused its discretion

The Supreme Court has even recognized that great weight should be given to spousal agreements as_to_support , despite the fact that support agreements (unlike equitable distribution agreements) may be routinely modified by the court on a simple showing of changed circumstances (Ganther_v_Ganther , supra; cf Lepis_v_Lepis 83 NJ 139 (1980)):

> "We have recognized and emphasized repeatedly that matrimonial agreements between spouses relating to alimony and support, which are fair and just, fall within the category of contracts enforceable in equity. Carlsen v Carlsen . 72 NJ 363, 370-371 (1977); Berkowitz v Berkowitz 55 NJ 564, 569 (1970); Schlemm v Schlemm 31 NJ 557, 581-582 (1960). Such agreements are essentially consensual and voluntary in character and therefore entitled to considerable weight with respect to their validity and enforceability not withstanding the fact that such an agreement has been incorporated in a judgment of divorce. Carlsen v Carlsen supra at 371." (Peterson v Peterson 85 NJ 638, 642 (1981))

The Peterson Court goes on to say at 642:

> "Accordingly we approach the spousal agreement in this case with a predisposition in favor of its validity and enforceability."

The trial court quite clearly violated this principle of predisposition in favor of the validity and enforceability of a

marital agreement. There can be no doubt from an examination of the record that the court did not approach the provision in paragraph 4 of the divorce judgment, the very "...basis on which this arrangement and custody have been made between plaintiff and defendant" (Pa4), with a predisposition in favor of its validity:

page 15

> "THE COURT: What proof is there that they'd be damaged by a move? I don't see... there is nothing to tell me..." (T10-20 to 22)

Quite obviously the Court has shifted the burden to plaintiff to prove that setting aside the judgment and permitting the move would be harmful. At no point in the proceedings did the court even ask defendant to prove harm to himself or to the children from enforcement of his obligations under the agreement and the judgment.

In shifting the burden to plaintiff and requiring her to prove why a 5 year old agreement *should* be enforced, the trial court exercised its discretion "arbitrarily and not in consonance with established principles of law" (*La Bell* supra).

(3) The third important principle of law which governed the trial court was the standards discussed above, for the review of applications under Rule 4:50. Defendant was required to show that enforcement of the judgment should be unjust, oppressive, or inequitable (*Quagliato v Bodner* supra), or alternately, that enforcement would work a great hardship on him *and* that the equities clearly run in his favor (*Doyle v Chase Manhatten Bank* supra).

It is hard to imagine how defendant could argue that the equities clearly run in his favor in this case. He voluntarily

entered into an agreement, reaped substantial benefits from that agreement, including custody of his children and possession of the marital residence, and then went to court 5 years later asking for relief from his primary obligation under the agreement. It was clearly foreseeable to him at the time he enterd into the agreement,

that at some time in the future, he might want a larger place to live. He was 28 years old when he entered into the agreement, and remarriage and the further expansion of his family was certainly foreseeable. In agreeing to remain in the marital residence until the children graduate from high school, defendant was implicitly agreeing that if he needed more room for his family he would have only one option, to add on to his existing residence. He gave up his other

obvious option to move to a larger residence. And in no way was that an unfair, or an unconscionable agreement. It was entered into voluntarily and substantial benefit was derived in exchange for his promise not to move. It is in now way unjust or inequitable to hold defendant to the obligation of his bargain after he has already received the benefits of that bargain.

Defendant still has the perfectly reasonable option of adding on to his house. In fact, considering the costs of selling defendant's house (%6 broker's commission on a $150,000 home=$9,000 (Pa51)) and the additional expenses of buying another house (home & termite inspections, survey, title search & ins., mortgage application fees, loan origination & discount & appraisal fees, credit reports, and attorney fees), the cost of adding on to defendant's present

home (estimates of Brackett Construction Co. for an add on to a similar home at Pa42-Pa45) would probably be no greater than the costs of moving.

And even if the expense of adding on were considerably greater, this still would not constitute undue hardship. That is the price defendant paid for entering into a voluntary agreement with plaintiff.

page 17

It seems apparant that the trial court treated the property settlement agreement before it, not as one which was entered into and incorporated into a divorce judgment 5 years ago, but rather as if it were before the court for the first time. In setting aside paragraph 4 of the agreement, Judge Imbriani completely ignored the standards for review of a Rule 4:50 Motion, and simply decided that he didn't like the agreement and wouldn't

enforce it. This manner of review was addressed and rejected in Gulick v Gulick 113 NJ Super 366, 369 (CH 1971)(quoted with approval in Barrie v Barrie 154 NJ Super 301, 307-308 (App Div 1977), certif. denied 75 NJ 601 (1978)):

> "Where the parties agree after arms-length negotiation and the court's approval by incorporation into a judgment appears, I think it can be fairly presumed that the totality of facts was available. To permit a court to be asked on the application of either one of the litigants at some later time to re-examine the facts which they and the court have already considered, toward the end of adding a supervening judgment to the parties' own considered determination, seems to me to be wrong in several respects. First, it fosters a sort of second-bite-from-the-apple philosophy. Either party may consciously accept a voluntary determination of support with the confidence that if things do not work out right, he can start all over again. Second, it imposes upon a trial judge the obligation of making a determination as to support, not in a relatively

> uncluttered arena of a first presentation of the facts, but rather, influenced, subconsciously or otherwise, by the support considerations which the parties voluntarily assumed after full fact finding, as it were. Third, it encourages something less than the best judgment in the litigants, at the important moment of the divorce, to bring to bear all those factors which might be the subject of proper consideration with regard to the matter of support. Finally, as noted in Martindell , it inflicts on the courts and the parties a heavy and unnecessary burden of belated reexamination"

The trial court abused its discretion by setting aside a judgment under R.4:50-1 in the absence of a requisite showing that the enforcement would have been unjust, oppressive, or inequitable to defendant. The lower court Order should therefore be reversed.

POINT II

DEFENANT'S MOTION FOR RELIEF FROM THE JUDGMENT WAS NOT MADE WITHIN A REASONABLE

TIME UNDER R.4:50-1(f) AND 4:50-2, NOR DID IT COMPLY WITH THE OTHER PROCEDURAL REQUIREMENTS OF RULE 4:50 MOTIONS, AND THE TRIAL COURT SHOULD THEREFORE NOT HAVE CONSIDERED THE MOTION.

R.4:50-2 requires that all applications to set aside judgment be made "...within a reasonable time,.."

In Palko v Palko 73 NJ 395 (1977), the court was faced with an application to set aside a property settlement agreement incorporated into a divorce judgment. In considering the timeliness of the application, the court said at 398:

> "A significant element in the timeliness of plaintiff's motion, noting the strictures of the rule, would consist of the date when plaintiff first discovered the facts underlying her application..."

In this case, the fact underlying the application was that defendant had another child and that room would have to be made for the child. Defendant first discovered this fact in about October,

1982, when the child was conceived (the child was born in June, 1983 (Pa11 at

page 19

para 4)). Yet, he waited 33 months, until June 1985, to make an application for relief.

The reason for the requirement of R.4:50-2, that an application to set aside a judgment must be made within a reasonable time, is of course the principle discussed above, that "...litigation must eventually be ended, and that at some point the prevailing party be allowed to rely confidently on the inviolability of his judgment." (Hodgson v Applegate supra at 43)

It seems clear that it was not reasonable for defendant to have waited 33 months to come to court to seek relief from the judgment. His motion should not have been considered.

Defendant also failed to follow the

other procedural requirement of R.4:50. The Rule states that an application will be considered "on motion with briefs...", yet, no brief was submitted by defendant in support of his motion, only a certification (Pa9-Pa14).

The reason why the requirements of R.4:50 were not followed is that defendant did not make his application under this rule. His application was actually made under Rule 1:6 (Pa9), the Rule governing ordinary motions for relief by the Chancery Division, Family Part. This may in part explain the obvious substantive and procedural deficiencies of defendant's case under R.4:50 (see Point 1 supra). However, it does not excuse those deficiensies.

In Ganther v Ganther supra, the Appellate Division reversed a trial court's Order modifying a term of a property settlement agreement. One reason

for the Ganther Court's decision was that plaintiff had not made a proper motion under R.4:50: page 20

> "Since the time within which to appeal from the judgment of divorce has expired without an appeal having been taken, and since the judgment has not been sought to be reopened and set aside pursuant to R.4:50-1 , the property settlement agreement included in the judgment is binding and enforceable against both plaintiff and defendant, and the trial court lacked the power to modify it." (Ganther at 231, emphasis supplied)

This is precisely the situation in this case. Neither the substantive, nor the procedural requirements of R.4:50 were met and defendant's application to set aside the judgment should not even have been considered by the court.

POINT III

IN ORDERING PLAINTIFF TO EXECUTE A QUIT CLAIM DEED RELEASING DEFENDANT FROM THE CONDITION OF THE CURRENT DEED REQUIRING HIM TO REMAIN IN THE MARITAL RESIDENCE UNTIL THE CHILDREN GRADUATE FROM HIGH

SCHOOL, WITHOUT AFFORDING PLAINTIFF THE RIGHT TO A FULL TRIAL ON ALL ISSUES CONCERNING HER INTEREST IN THE PROPERTY, THE TRIAL COURT DEPRIVED PLAINTIFF OF PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIED HER THE EQUAL PROTECTION OF THE LAWS, IN VIOLATION OF THE XIVTH AMENDMENT TO THE U.S. CONSTITUTION.

On January 14, 1981, some 5 months after the parties were divorced, plaintiff executed a deed to the marital residence at 71 Highland Avenue, Bridgewater, New Jersey. (Pa7) This deed transferred plaintiff's interest in said property to defendant. However, the deed contained a specific condition which retained for plaintiff a reversionary interest in the property:

> "...the condition of the conveyance, however, shall be the continued occupation of the said premises by the defendant and the infant children solely, or with defendant's wife should he remarry, until the last child graduates from high school..."

...page 23

decision taking away her property right

was made on a motion based upon certifications. She had no opportunity to present evidence disputing defendant's claims or to subpoena or cross-examine witnesses.

Such a summary decision denied to plaintiff the process due her and also, in treating her differently from others defending their property rights, with no rational basis for doing so, denied to her the equal protection of the laws.

POINT IV

IN LIGHT OF THE DISPUTED FACTUAL ISSUES BEFORE THE COURT, AND THE FACT THAT THE AMENDED PORTION OF THE PROPERTY SETTLEMENT AGREEMENT WAS CENTRAL TO THE ENTIRE AGREEMENT, THIS CASE SHOULD, AT THE VERY LEAST, BE REMANDED TO THE TRIAL COURT FOR A PLENARY HEARING ON ALL ISSUES.

The condition of defendant's continued occupancy in the marital residence until the youngest child graduates from high

school was the "... basis on which this arrangement and custody..." (Divorce Judgment Pa4)(emphasis supplied) was made between plaintiff and defendant. In amending this provision of the agreement the trial court has changed a key portion of an agreement voluntarily entered into between the parties. Unless this court reverses the decision of the trial court, as it should, plaintiff will have lost the most important thing she bargained for in giving up her right to occupy the marital residence, and in giving up her claim to custody of her children. She would not have made the agreement if she knew that defendant would be permitted to move from the home.

...24

END OF DOCUMENT

DANIEL MARTIN
Attorney at Law
356-12 Gemini Drive

S Somerville, NJ 08876
(201)874-4871
FILED APPELLATE DIV Jan 8 1986

LETTER BRIEF IN REPLY TO
DEFENDANT'S BRIEF IN RESPONSE

Honorable Judges of the
Superior Court of New Jersey
Appellate Division
State House Annex
Trenton, New Jersey 08625

FILED
APPELLATE
DIVISION
Feb 19 1986

Re:Mastropietro v Mastropietro
Docket No. A-220-85T6

Civil Action : On Appeal from an Order Amending Dual Final Judgment of Divorce by Chancery Div, Family Part, Somerset County

Sat Below : Hon Michael R. Imbriani, JSC without a jury

Your Honors: This letter brief is submitted in lieu of formal brief on appeal in the above captioned matter in accordance with Rule 2:6-2(b)

page 7

the preliminary Order of July 15th by recalculating the mileage restriction therein. In fact, as discussed supra at footnote (1), plaintiff agreed to the

proposed mileage modification prior to oral argument on Defendant's Motion for Reconsideration. (Pra2,para 9)

It should be made absolutely clear that the trial court's modification of the 5_year_old_Dual_Final_Judgment_of Divorce , which is the subject of this appeal, can not in any way be justified by the trial court's authority to grant relief where an error in an earlier determination is ascertained. There was clearly no error in that determination, nor has defendant put forth any other ground under R.4:50-1 to justify the modification of paragraph 4 of the divorce judgment (see Pb at 5-18).

POINT_III

IT IS ABSOLUTELY CLEAR FROM THE RECORD THAT THE ENTRY OF THE ORDER OF AUGUST 9, 1985 VIOLATED THE REQUIREMENTS OF RULE 4:42-1.

In Point III of his brief in response defendant argues that the entry of the August 9, 1985 Order was proper under the Rules of the Court. An examination of the record reveals otherwise.

The sequence of events surrounding the entry of the August 9, 1985 Order was set forth in plaintiff's brief (Pb2)

On August 2, 1985 an oral decision was rendered by Judge Imbriani.

On August 6, 1985 a proposed form of Order was submitted by defendant's attorney. A copy was sent to plaintiff pursuant to the "5 day rule", R.4:42-1(b).(Pa19)

On August 8, 1985 plaintiff filed her timely objections to the proposed form of Order. (Pa20)

...page 10

END OF DOCUMENT

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-220-85T6

MAXINE L. MASTROPIETRO, Plaintiff-Appellant, v ROBERT A. MASTROPIETRO, Defendant-Respondent.	ORIGINAL FILED APR 30 1986 ELIZABETH MCLAUGHLIN CLERK

Submitted April 16, 1986-Decided APR 30 1986 Before Judges Fritz and Baime.

On appeal from Superior Court of New Jersey, Chancery Div, Fmy Part, Somerset County.

Daniel L. Martin, attorney for appellant

Leroy P. Lusardi, attorney for respondent

PER CURIAM

This is an appeal from an order of the Superior Court, Chancery Division, modifying a provision contained in a previously entered dual judgment of divorce which precluded defendant from moving out of the marital home until the youngest of the parties' three children graduated from high school. The trial

judge granted defendant's application permitting him to move to a new home within 4.1 miles of plaintiff's present residence. Although phrased in a variety of ways, plaintiff's principal contention is that the trial judge abused his discretion. We disagree and affirm.

The salient facts are not in dispute. The parties were divorce in September 1980 following seven years of marriage. Pursuant to the parties' agreement, defendant retained custody of the couple's three children. As part of the property settlement, defendant agreed to purchase plaintiff's share of the marital residence. However, plaintiff's conveyance of her interest to defendant was bottomed on the following condition which was set forth in the final judgment of divorce:

> The condition of this conveyance ...shall be the continued occupation of the said [home]

> by defendant and the infant children solely, or with defendant's wife should he remarry, until the last child graduates from high school, this condition being the basis on which this arrangement and custody have been made between plaintiff and defendant.

This condition was also incorporated in the deed conveying plaintiff's interest in the marital residence to defendant.

In June 1985, defendant filed a motion seeking modification of the judgment of divorce to permit him to move to another address. In an accompanying certification, defendant represented that he had remarried in April 1982 and that a son had been born in June 1983. He stated that his present house had only three bedrooms and approximately 1000 square feet of living space. In view of these cramped conditions, defendant requested amendment of the divorce judgment to allow him to move to a larger house within 25 mile radius of Bridgewater.

Plaintiff opposed the motion. She contended that the provision in the property settlement which precluded defendant from moving out of the marital home until the children graduated from high school was an essential condition of her agreement to surrender custody. She claimed that the stability and friendliness of the neighborhood were significant factors contributing to her children's well being. She also cited what she perceived as a realistic danger that if defendant were permitted to move to another area he would "poison" the new neighborhood's attitude toward her.

Citing the crowded nature of defendant's present living conditions, the trial judge granted the motion to modify the judgment of divorce. However, he directed that defendant not move beyond three miles of plaintiff's address in order to facilitate continued frequent

visitation. The judge concluded that the children would not be harmed by changing neighborhoods and that the prospective move would benefit the family unit. Defendant subsequently moved for reconsideration and requested that he be permitted to move to a residence within 4.1 miles of plaintiff's home. Following argument, the trial judge granted defendant's motion. This appeal followed.

Our thorough review of the record convinces us that the trial judge did not abuse his discretionary powers granted under R.4:50-1(f). We note at the outset that application for modification of a

1. Plaintiff did not appeal from the original order. Her notice of appeal refers only to the order granting defendant's motion for reconsideration. As noted previously, however, her arguments on appeal pertain to the first order. We have, nevertheless, chosen to overlook this irregularity and decide the appeal on the merits.

property seelement agreement, incorporated into a final judgment of divorce, falls within the purview of that rule. See Palko v Palko , 73 N.J. 395, 398 (1977); Edgerton v Edgerton , 203 N.J. Super 160, 173 (App Div 1985); Ganther v Ganther 153 NJ Super 226, 230-231 (App Div 1977). Such a motion is addressed to the discretion of the trial judge. The discretion conferred by the rule "is a broad one to be exercised according to equitable principles..." Court Invest Co v Perillo 48 NJ 334, 341 (1966). The very essence of the rule is "its capacity for relief in exceptional situations." Ibid. Thus, "strict bounds never confine its scope." Hodgson v Applegate 31 NJ 29, 41 (1959). Its boundaries "are as expansive as the need to ahcieve equity and justice." Court Invest Co v Perillo supra 48 NJ at 341. See also Manning Engineering Inc v Hudson

Cty Park Comm 74 NJ 113, 122 (1977); Quagliato v Bodner 115 NJ Super 133, 138 (App Div 1971). The decision reached by the trial judge is to be sustained by an appellate court "in the absence of an abuse of its discretion." Court Invest Co v Perillo supra 48 NJ at 341.

While we recognize that relief from a judgment is permitted under R.4:50-1(f) "only when truly exceptional circumstances are present," Bauman v Marinaro 95 NJ 380, 395 (1984); Gulick v Gulick 113 NJ Super 366, 370 (Ch Div 1971), we cannot fairly say that the trial judge mistakenly exercised hes discretion in this case. Nor can we say that defendant's motion was not made within a reasonable time under R.4:50-2. While defendant may have anticipated earlier the problems that ultimately compelled him to seek relief from the divorce judgment, this delay was not

prejudicial to plaintiff and was understandable in light of the gradually increasing need for living space as the children grew older.

We also reject plaintiff's contention that she was entitled to a plenary hearing. An evidentiary hearing is not warranted in every case. We conclude from the record that there was no genuine issue of material fact. We, thus, find that the trial judge did not abuse his discretion in denying an evidentiary hearing. Barrie v Barrie 154 NJ Super 301, 307 (App Div 1977), certif den 75 NJ 601 (1978).

In the final analysis, "[i]t is not surprising...that this litigation will end on the same disappointing note as the marriage." Perkins v Perkins 159 NJ Super 243, 248 (App Div 1978). Nevertheless, we are convinced that the trial judge did the best he could within

the context of the competing arguments advanced. We cannot say that he was wrong.

Accordingly, the order of the Chancery Division modifying the judgment of divorce is affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.
Elizabeth McLaughlin
Clerk

END OF DOCUMENT

DANIEL MARTIN,ESQ
356-12 Gemini Dr.
S Someville, NJ 08876
(201)874-4871
Attorney for
Plaintiff

RECEIVED
May 29 1986
SUPREME COURT
OF NEW JERSEY

May 29, 1986

The Honorable Chief Justice and Associate Justices Supreme Court of New Jersey
State House Annex
Trenton, New Jersey 08625

Re: Mastropietro v Mastropietro
Docket No 220-85T6

LETTER IN LIEU OF FORMAL PETITION FOR CERTIFICATION

off remaining in the current residence. (Pa35 para 3; Pa40 para 5-7; T*7-13 to 17; T10-10 to 15)

On September 3, 1985 the marital residence was listed for sale (Pa38). As of the date these papers are filed it has not been sold.

QUESTIONS PRESENTED

1. Did the trial judge abuse his discretion by ordering the amendment of a 5 year old Judgment of Divorce in the absence of any evidence that the enforcement of the judgment would be unjust, oppressive, or inequitable to defendant?

2. Should defendant's motion for relief from the judgment have been dismissed for failure to comply with the requirement of R.4:50-2, that such

motions be made within a "reasonable time"?

3. Is plaintiff entitled to a plenary hearing to resolve disputed factual issues which are at the heart of this matter?

4. By ordering plaintiff to execute a quit claim deed relinquishing her reversionary interest in the marital property, without affording her the right to a full trial of all issues concerning her interest in that property, did the trial court violate the Due Process and Equal Protection Clauses of the XIVth Amendment?

5. Did the trial court violate plaintiff's basic Constitutional right to raise her children, by overruling the parenting decision made by plaintiff (and agreed to by defendant in 1980) that the children's interests would be best served by remaining in the marital residence

through high school?

page 6

6. Given the fact that the entire property settlement agreement was based upon the provision of paragraph 4 of the judgment of divorce requiring defendant to remain in the marital residence, if that provision is deleted, is the agreement void and is plaintiff now entitled to a plenary hearing to litigate all issues previously covered by the agreement?

...page 20

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MAXINE L. MASTROPIETRO Plaintiff-Petitioner v ROBERT A. MASTROPIETRO Defendant-Respondent	SUPREME COURT OF NEW JERSEY C-1086 SEPTEMBER TERM 1985 25,691

ON PETITION FOR CERTIFICATION
FILED SUPREME COURT JUN 30 1986 CLERK

To the Appellate Division, Superior Court

A petition for certification of the judgment in A-220-85T6 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS. the Honorable Robert N Wilentz, Chief Justice, at Trenton, this 27th day of June, 1986

Stephen Townsend
CLERK OF THE SUPREME COURT

END OF DOCUMENT

Supreme Court, U.S.
FILED
NOV 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-508

SUPREME COURT OF THE

UNITED STATES

MAXINE L. MASTROPIETRO, PETITIONER

V.

ROBERT ALAN MASTROPIETRO, RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION

OPPOSING BRIEF ~~AND APPENDIX~~ OF RESPONDENT IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

LEROY P. LUSARDI, ESQ.
265 East Main Street
Somerville, N.J. 08876

TABLE OF CONTENTS

PAGE

Table of Contents.....1

Table of Authorities.....2

Statement of Case.....3

Summary of Argument.....4

Argument.....6

Conclusion.....9

Appendix.....a1
(App. Div. brief)

TABLE OF AUTHORITIES

PAGE

Rules of the Supreme Court of the United States, Rule 17.....6

STATEMENT OF THE CASE

See Statement of Facts

(Ra 4-5).

DOCUMENT LODGED WITH COURT CLERK

SUMMARY OF ARGUMENT

This case involves nothing more or less than the unspectacular and rather common attempts to modify a judgment of divorce as changed circumstances occur. Although Petitioner succeeded in defeating a good deal of the relief sought by the Respondent in the State Court, Petitioner now attempts to utilize Constitutional arguments to receive total relief. Respondent contends that the State Court in granting the limited relief to Respondent did not violate any of Petitioner's constitutional rights. It is Respondent's contention that Petitioner is attempting to minimize the function of Respondent as the custodial parent. Therefore, it is Respondent's contention that the grounds for granting a Writ of Certiorari

are not present as there is no subsequential federal question.

ARGUMENT

Respondent has reviewed the criteria for the granting of relief of the Writ of Certiorari set forth in the Supreme Court Rule 17. Respondent is unable to find any substantial or important reasons where the State Court has violated Peitioner's rights. The type of suggested cases whereupon the Court may act in its decision does not appear to be present. Nowhere in Petitioner's brief is there a suggestion that the State Court has decided a federal question in conflict with the decision of another state nor that the State Court has decided an important question of federal law, which has not been, but should be settled by this Court.

Petitioner complains about the procedure in the State Court. It should be pointed out, that the State Courts, bent over backwards to be fair to Petitioner. Petitioner did not file a notice of appeal to the original modification order but only in connection with the subsequent corrective order. This was duly noted in the Appellate Division of New Jersey decision (Pa 98) by way of footnote.

Petitioner also argues a violation of constitutional rights connected with property or parental rights. As to the former, Petitioner is in error, as the property in question is owned by the Respondent. In the deed of conveyance from Petitioner to Respondent, Petitioner inserted references to the restrictive provisions contained in the judgment of

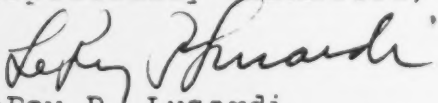
divorce. Respondent contends that this does not violate any property rights of Petitioner. Likewise, Respondent is the custodial parent and has to face the day-to-day problems in raising children. Petitioner seeks to restrict Respondent's exercise of that obligation. For, in fact, parenthood seems to deal more with obligations than rights.

CONCLUSION

Wherefore, Respondent respectfully requests that the Court deny Petitioner's request for the review of Writ of Certiorari.

Dated: October 23, 1986

Respectfully submitted,



LeRoy P. Lusardi
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Counsel for Respondent

FILED
NOV 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-508

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1986

MAXINE L. MASTROPIETRO, PETITIONER

V.

ROBERT ALAN MASTROPIETRO, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPERIOR COURT OF NEW JERSEY,

APPELLATE DIVISION

PETITIONER'S REPLY MEMORANDUM

Daniel Martin, Esq.

RD1 Box 160

Titusville, NJ 08560

TABLE OF CONTENTS

PAGE

Table of Contents.....i

Table of Authorities.....ii

Statutes, Rules and Constitutional Provisions Involved.....i3

Argument.....1

Conclusion.....7

Appendix.....PRa1

TABLE OF AUTHORITIES

page

Barrie v Barrie
154 NJ Super 301 (App Div 1977)..3

Cooper v Cooper
99 NJ 42 (1984).....4

Ganther v Ganther
153 NJ Super 226 (App Div 1977)..3

STATUTUES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. N.J.S.A. ARTICLE 6. ALIMONY AND MAINTENANCE

2A:34-23. Alimony; maintenance; custody and maintenance of children; security; failure to obey order; sequestrian; receiver; modification of orders; equitable distribution of property:

Pending any matrimonial action brought in this State or elsewhere, or after judgment of divorce or maintenance, whether obtained in this State or elsewhere, the court may make such order as to the alimony or maintenance of the parties, and also as to the care, custody, education and maintenance of the children, or any of them, as the circumstances of the parties and the nature of the case shall render fit, reasonable and just, and require reasonable security for the due

observance of such orders. Upon neglect or refusal to give such reasonable security, as shall be required, or upon default in complying with any such order, the court may award rents and profits of the real estate of the party so charged, and appoint a receiver thereof, and cause such personal estate and the rents and profits of such real estate, or so much thereof as shall be necessary, to be applied toward such alimony and maintenance as to the said court shall from time to time seem reasonable and just; or the performance of the said orders may be enforced by other ways according to the practice of the court. Orders so made may be revised and altered by the court from time to time as circumstances may require. (emphasis supplied)

In all actions brought for divorce, divorce from bed and board, or nullity

the court may award alimony to either party, and in so doing shall consider the actual need and ability to pay of the parties and the duration of the marriage. In all actions for divorce other than those where judgment is granted solely on the ground of separation the court may consider also the proofs made in establishing such ground in determining an amount of alimony or maintenance that is fit, reasonable and just. In all actions for divorce or divorce from bed and board where judgment is granted on the ground of institutionalization for mental illness the court may consider the possible burden upon the taxpayers of the State as well as the ability of the plaintiff to pay in determining an amount of maintenance to be awarded.

In all actions where a judgment of divorce or divorce from bed and board is entered the court may make such award or

awards to the parties, in addition to alimony and maintenance, to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage. However, all such property, real, personal or otherwise, legally or beneficially acquired during the marriage by either party by way of gift, devise, or intestate succession , shall not be subject to equitable distribution, except that interspousal gifts shall be subject to equitable distribution.

Amended by L.1971, c. 212, sec 8; L.1980, c. 181, sec1, eff. Dec 31, 1980; L.1983, c. 519, sec 1, eff. Jan. 17, 1984.

GOVERNOR'S RECONSIDERATION AND RECOMMENDATION STATEMENT
Assembly, No. 1896-L.1983, c.519

To the General Assembly:

Pursuant to Article V, Section I, paragraph 14 of the Constitution, I

herewith return Assembly Bill No. 1896 (OCR) with my recommendations for reconsideration.

Assembly Bill No. 1896 exempts property received by descent or other distribution from equitable distribution in divorce cases.

Under current law when parties become divorced, the property which they acquired during the marriage is divided between them. The allocation to each spouse of a share of the joint assets is known as "equitable distribution."....

2. N.J.S.A. 9:2-2 CUSTODY OF CHILDREN OF DIVORCED OR SEPARATED PARENTS WITHIN JURISDICTION OF SUPERIOR COURT; REMOVAL FROM JURISDICTION; CONSENT; SECURITY

When the Superior Court has jurisdiction over the custody and maintenance of the minor children of parents divorced, separated or living

separate, and such children are natives of the State, or have resided five years within its limits, they shall not be removed out of its jurisdiction against their own consent, if of suitable age to signify the same, nor while under that age without the consent of both parents, unless the court, upon cause shown, shall otherwise order. The court, upon application of any person in behalf of such minors, may require such security and issue such writs and processes as shall be deemed proper to effect the pruposes of this section.

Amended by L.1948, c. 321, p. 1295, sec 2.

ARGUMENT

Respondent's opposing brief, short as it is, contains several errors which must be brought to the attention of the court:

I Respondent claims that this case does not fall within the guidelines set forth under Rule 17, as to when this court may grant a writ of certiorari. This claim is based upon the fact that this case does not fall into one of the categories of cases listed in 17.1 (a) (b) and (c) where a writ of certiorari may be granted. However, it is very clearly stated in Rule 17, that the types of cases listed in subparagraphs (a)-(c) are "...neither controlling nor fully measuring [of] the court's discretion..." to grant writs of certiorari.

Here, as set forth in the petition itself, petitioner's constitutional

rights were violated by the courts of the State of New Jersey throughout the state court proceedings. A writ of certiorari is clearly available to remedy such violations under 28 USC 1257 (3).

II Respondent mischaracterizes both the facts of this case, and New Jersey caselaw governing this case when he states at page 4 of his opposing brief,

> "This case involves nothing more or less than the unspectacular and rather common attempts to modify a judgment of divorce as changed circumstances occur."

In fact, this is anything but a common case, as the trial court pointed out during oral argument,

> "Obviously, as I have indicated, that is a very unusual provision, frankly, in 9 years on the bench." (PRa2)

Moreover, judgments of divorce in New Jersey are not subject to routine modification whenever changed

circumstances occur. In raising the issue of changed circumstances, respondent has attempted to confuse the standard for modification of custody and support orders under NJSA 2A:34-23, which specifically permits routine modifications whenever changed circumstances occur, with the much stricter standard for post-judgment modification of property provisions of a divorce judgment. It is clear under New Jersey law that an application to modify a property provision of a divorce judgment must be considered under the same strict standard which applies to applications to modify all final judgments, and not under the more liberal standard for modification of support and custody orders. (Ganther v Ganther 153 NJ Super 226 (App Div 1977); Barrie v Barrie 154 NJ Super 301 (App Div 1977); certif. denied 75 NJ 601 (1978))

III Respondent claims at page 4 and again at page 8 of his opposing brief that because he is the custodial parent, petitioner's parental rights are not worthy of protection by the court. Respondent offers no support in either State or Federal law for this contention. In fact, the parental rights of non-custodial parents are protected in New Jersey both by statute (NJSA 9:2-2 set forth above forbids a custodial parent from removing a child from the State without the other parent's consent) and by the holdings of the New Jersey Supreme Court (cf Cooper v Cooper 99 NJ 42 (1984))

Moreover, while respondent may technically be the "custodial" parent, by his own admission the children spend as much, if not more time with petitioner than they do with him:

"My former wife has been

> taking the children three and four nights during the week and two out of three weekends." (Respondent Certification in Support of Motion at a20)

IV As he has done throughout this litigation, respondent has ignored the important issues of law raised by petitioner. Instead he has attempted to deflect the attention of the Court by superfluous statements, totally without documentation of citations from state or federal law, which are irrelevant to the legal inquiry at hand. The very crux of petitioner's case before this Court is the consistent failure of the State courts to follow required procedures, or to apply proper standards under New Jersey law in considering respondent's motion to modify the terms of a final divorce judgment. In his opposing brief, respondent failed to address any of the procedural irregularities raised by

petitioner at pages 15-50 of her petition.

Instead, he claimed that because the Appellate Division chose to overlook what that court called a procedural "irregularity" in petitioner's papers, it had,

> "...bent over backwards to be fair to petitioner." (Opposing brief at pg 7)

In fact, the so-called irregularity, was thoroughly documented in petitioner's reply brief to the Appellate Division. The so-called irregularity (respondent's contention that petitoner's appeal was inconsequential because the merits addressed were those of an order of July 15, 1985 not those of the order of August 9, 1985) was respondent's entire basis of reply to the Appellate Division brief; it was respondent's attempt to confuse the court surrounding numerous sequential events of procedural due process.

Petitioner had contended that the court had misapplied standards for opening a 5 year old judgment of 1980. Respondent contended that the court had not erred in opening the order; however, Respondent referenced the order of July 15, 1985, which he phrased "opened" to allow respondent's "Motion for Reconsideration" of August 2, 1985. It is clear that the only judgment opened was that of 1980; that the only final order of the 1985 litigation was the August 9th Order; and that only <u>final</u> orders are appealable under State law. Petitioner made a timely appeal of that final order of 1985.

What isn't addressed in respondent's opposing brief is the continuing series of procedural irregularities detailed in the petition which resulted in a denial of Due Process to petitioner.

CONCLUSION

Wherefore, petitioner respectfully

requests that her petition for writ of certiorari be granted.

DATED: November 6,1986

DANIEL MARTIN
RD 1 Box 160
Titusville, NJ 08560
Counsel for Petitioner

APPENDIX

SUPERIOR COURT OF NEW JERSEY FAMILY PART: SOMERSET COUNTY DOCKET NO M-8660-79

MAXINE L. MASTROPIETRO
Plaintiff
v.
ROBERT A. MASTROPIETRO
Defendant

STENOGRAPHIC TRANSCRIPT OF EXCERPT OF PROCEEDINGS

PLACE:
Somerset County Court
Somerville, NJ

DATE:
August 2, 1985

BEFORE: THE HONORABLE MICHAEL R. IMBRIANI JSC

TRANSCRIPT ORDERED BY:
Maxine L. Mastropietro

A P P E A R A N C E S:

MAXINE L. MASTROPIETRO
Plaintiff Pro Se

LEROY P. LUSARDI, ESQ.
Attorney for the Defendant

CHARLES R. SENDERS, CSR
OFFICIAL COURT REPORTER
SOMERSET COUNTY COURTHOUSE
SOMERVILLE, NEW JERSEY 08876

PRa1

judgment of divorce whereby he would not move out of the house.

Obviously, as I have indicated, that is a very unusual provision, frankly, in 9 years on the bench.

Obviously, it was very important to Mrs. Mastropietro, very important to Mr. Mastropietro that they both agreed. That is the only reason it was in the judgment.

Now, Mr. Mastropietro says that he'd like to cancel and rescind that provision. Because he has remarried and has additional obligations. That it is something that could not have been anticipated.

I think that when a person divorces today, he should anticipate remarriage and should have thought about that problem.

Mrs. Mastropietro has pointed out that even if the house is small, there can

always be additions made to the house.

For me to unilaterally say to Mrs. Mastropietro that I'm going to void the clause in the paragraph, in the judgment, and require her to travel greater distances to visit with her children, and vice versa, there will come a time when the children will want to visit with her when they are 16 and 17.

....16

END OF DOCUMENT